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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 153

DANIEL McMANN, Warden of Clinton Prison, Dannemora, New York and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

against

WILBERT ROSS, WILLIE RICHARDSON, FOSTER DASH and McKINLEY WILLIAMS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. .....

DANIEL MCMANN, Warden of Clinton Prison, Dannemora, New York and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

against

WILBERT ROSS, WILLIE RICHARDSON, FOSTER DASH and MCKINLEY WILLIAMS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, the Wardens of the two New York State prisons in which respondents are presently incarcerated,* pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit in the cases of *United States of America ex rel. Wilbert Ross* v. *McMann* (judgment entered February 26, 1969); *United States of America ex rel. Willie Richardson* v. *McMann* (judgment entered February 26, 1969); *United States of America ex rel. Foster Dash* v. *Follette* (judgment entered February 26, 1969); and *United States of America ex rel. McKinley Williams* v. *Follette* (judg-

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* Respondents Ross and Richardson are in the custody of petitioner McMann; respondents Dash and Williams are in the custody of petitioner Follette.

ment entered March 20, 1969). The mandates have been stayed by the Court of Appeals pending the filing of this application for certiorari.

Citations to Opinions Below

Neither the District Court nor the Circuit Court opinions in any of these cases have as yet been reported. The District Court opinions are reproduced as Appendix "A" to this petition. The Circuit Court opinions are reproduced as Appendix "B" to this petition.

Jurisdiction

The judgments of the United States Court of Appeals in the *Ross, Dash* and *Richardson* cases were entered on February 26, 1969. The judgment in the *Williams* case was entered on March 20, 1969.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented

1. Does a claim that an otherwise voluntary plea of guilty was induced by the existence of illegally obtained evidence state a claim warranting relief by way of federal habeas corpus?

2. Should the new rule announced below be given retroactive application?

3. Do any of the instant petitions raise issues warranting evidentiary hearings?

Statement of the Case

In the instant cases,* the Second Circuit has held that the allegation by a state prisoner in a petition for federal habeas corpus that his guilty plea was induced by the "existence and threatened" use of evidence subsequently claimed to have been illegally obtained, entitles him to an evidentiary hearing to challenge the evidence as well as the claimed inducement.

In opinions inconsistent with reason and sound policy, and inconsistent, too, with the decisions of this Court and its own prior decisions, the Court has opened for collateral consideration and invalidation, virtually all pleas of guilty in New York, which comprise 95% of its judgments of conviction.

Having mandated hearings, the Court provided no "intelligible guidelines" for their conduct, as the powerful dissent of Judge Friendly pointed out. The instant petitions present unexceptional, belated allegations of coercion and inducement unsupported by the record or any outside facts. The decisions to require evidentiary hearings in such cases will preclude a contrary result in few others. The decisions are, therefore, possibly the most important cases in the criminal law field recently decided by a Circuit Court.

A. Ross:

Wilbert Ross was convicted in the former County Court of Kings of the crime of murder in the second degree upon his plea of guilty in satisfaction of an indictment charging

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* In a fifth case, *United States ex rel. Rosen* v. *Follette*, the Court of Appeals denied relief. An application for certiorari has been filed and is presently pending in this Court (No. 1762 Misc. Oct. T. 1968). Petitioners here have joined in that application.

him with the commission of murder in the first degree. On March 14, 1955 Ross was sentenced to a term of forty-five years to life. No appeal was taken from the judgment of conviction.

Ten years later he applied for a writ of error coram nobis in the New York Supreme Court, Kings County seeking to vacate the judgment of conviction rendered against him. The grounds for the application do not appear in the record. This application was denied without a hearing by order dated May 25, 1965. The Appellate Division unanimously affirmed the order without opinion, in *People* v. *Ross*, 272 N.Y.S. 2d 969 (2d Dept., 1966) (not officially reported) and leave to appeal was denied by the New York Court of Appeals on January 10, 1967.

In his application for habeas corpus to the United States District Court for the Eastern District of New York, Ross alleged that while in state custody he was taken to the District Attorney's office and questioned about the commission of a murder; that he was thereafter coerced into signing a confession; that his request for counsel was denied; and that he was not advised of his right to counsel or right to remain silent. Ross further alleged that five weeks subsequent to his being charged in an indictment with the commission of first degree murder, he requested his attorney to seek the return of his confession but that his court appointed attorney advised him that "it was out of the question". Further, Ross alleged that his attorney told him that in addition to the confession the District Attorney was in possession of the murder weapon and that a fellow participant in the crime would be a state's witness against him.

Some time thereafter, according to Ross, his counsel advised him that the District Attorney would accept a plea to murder in the second degree and that Ross would re-

ceive a sentence of from twenty years to life. Ross alleged that he then went into the courtroom and pleaded guilty to second degree murder and, as noted above, was sentenced to forty-five years to life imprisonment. He offered no evidence to corroborate any of his allegations.

District Judge Bruchhausen denied the application without a hearing on the basis of the opinion in *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018 (2d Cir. 1965) which holds that "a voluntary guilty plea entered on advice on counsel is a waiver of all non-jurisdictional defects in any prior stages of the proceedings against him (*id.* at 1019).

B. Richardson:

Willie Richardson was convicted of the crime of murder in the second degree upon a plea of guilty which satisfied an indictment charging him with two counts of murder in the first degree. On October 9, 1963, he was sentenced in the Supreme Court, New York County to a term of 30 years to life in State Prison. No appeal was taken from the judgment of conviction.

In June, 1964, Richardson applied for a writ of error *coram nobis* to the Supreme Court, New York County alleging that he had made an involuntary confession and that his conviction "was based solely on this confession." No factual allegations were made in support of this claim except that he was arrested on a Sunday night and held until the following morning for arraignment. The application was denied without a hearing on July 27, 1964. On appeal to the Appellate Division, First Department, the order was unanimously affirmed (23 A. D. 2d 969 [1st Dept. 1965]) and on June 8, 1965 leave to appeal to the Court of Appeals was denied.

In his application for habeas corpus to the United States District Court for the Northern District of New York,

Richardson alleged that he was taken into custody in connection with the homicides of two relatives; that he asked to call an attorney since he was on parole and his request was denied; and that he thereafter signed a confession "obtained from his by means of abuse and threat of bodily harm". He claimed that his federally protected rights were violated in that he involuntarily pleaded guilty because of the existence of this confession. He vaguely mentioned that he was denied the right to withdraw his guilty plea—although it is not clear by whom—and he also obliquely challenged the quality of his lawyer's representation. Neither point was pursued as a separate claim.

After examining the petition and the minutes of plea and sentence, Judge BRENNAN determined that Richardson was represented by assigned counsel whose representation was not alleged to be ineffective, that the plea was accepted only after Richardson "indicated that such a course of action was desired by him and that he had discussed same with both counsel", that sufficient inquiry was made into the voluntariness of the plea and that Richardson pleaded to a lesser charge. He therefore concluded that the plea was voluntary and that no hearing was necessary. He characterized the claim as an afterthought, pointing out that "Almost 3 months [after the plea], when sentence was imposed, although opportunity was afforded [he] raised no question as to the validity of his plea".

Richardson moved for re-argument alleging that the minutes of his plea would show that after the plea was accepted he attempted to withdraw it, and told the Judge that he had confessed and pleaded to a crime he did not commit. Judge BRENNAN rejected this claim after finding that it had never been presented to the State Courts and that, in any event, insufficient facts were alleged in the petition. He specifically cited the lack of any reference to such a motion in the minutes of plea and sentence and the absence of any supporting affidavit from Richardson's attorney.

In his application to the Circuit Court of Appeals for a certificate of probable cause Richardson alleged for the first time that his lawyer advised him that his plea would not preclude a later challenge to the voluntariness of the confession since a guilty plea would not constitute a waiver of his constitutional rights. And in a new affidavit attached to his brief in the Circuit Court he alleged for the first time that his assigned attorney paid him only one 10 minute visit prior to the date of plea and that the decision to plead was made during a 3 or 4 minute conference on the day of plea.

C. Dash:

On February 9, 1959, one Schedletsky, was held up and robbed by three persons, at least one of whom was armed.

On February 24, 1959, an indictment was returned in Bronx County in which one Fields, was named as a defendant and conspirator. The three robbers were indicted under the designations of "John Doe", "Richard Roe" and "Peter Loe" and warrants were issued for their arrest. Fields was apprehended immediately after the crime and, apparently, he implicated Dash and two others, Waterman and Devine. See *People* v. *Waterman,* 12 A. D. 2d 84 (1st Dept., 1960).

Dash was arrested on February 26, 1959.

Waterman was questioned by a detective on June 17, 1959, in the Tombs in Manhattan, where he was incarcerated on another charge, and again, on June 29, 1959, in the detention cells of the Bronx County building. On each occasion, according to the testimony of the detective, Waterman made a complete confession, admitting that he, Devine, Fields and Dash had participated in the robbery in question. See *People* v. *Waterman,* 9 N. Y. 2d 561 (1961).

According to Dash, following his arrest, he was questioned by the police and an Assistant District Attorney of Bronx County, which led to his signing a confession.

On April 6, 1959, Dash pleaded guilty to the crime of robbery in the second degree. Fields, likewise, pleaded guilty.

On August 3, 1959, Dash was sentenced to a term of 8 to 12 years as a multiple offender. Fields was sentenced to 10 to 12 years.

Waterman and Devine went to trial, were convicted of robbery in the first degree, grand larceny in the second degree and assault in the second degree, and were sentenced on December 1, 1959 to terms of 15 to 20 years.

They appealed that conviction and the judgment was reversed by the Appellate Division, First Department (12 A. D. 2d 84). On May 18, 1961, the New York Court of Appeals affirmed the order of the Appellate Division on the ground that it was constitutional error to admit into evidence post-indictment statements taken in the absence of counsel (9 N. Y. 2d 561). Thereafter, Waterman and Devine pleaded guilty to the crime of assault in the second degree and were sentenced to terms of 2½ to 3 years.

It was only then that Dash instituted two *coram nobis* proceedings in which he raised two points—(1) that he was entitled to the same relief as Waterman since his alleged confession induced his plea of guilty and (2) his plea was coerced by a threat of the Court to impose maximum punishment if he went to trial and was convicted and by his attorney's advice that he would undoubtedly be convicted in the face of the confession. The writs were denied without a hearing, the orders affirmed by the Appellate Division, First Department (21 A. D. 2d 978), and by the New York Court of Appeals, two judges dissenting (16 N. Y. 2d 493 [1965]).

Dash then petitioned the United States District Court for the Southern District of New York for a federal writ of habeas corpus alleging two grounds for relief. First, he alleged that a false confession was obtained from him by force and threats after indictment, in the absence of counsel, and second, that the plea was involuntary, being induced by the unrecorded threats of the trial court. The District Court (CANNELLA, J.) denied the application on the authority of *United States ex rel. Glenn* v. *McMann, supra,* and found, after reviewing the State Court records that Dash was not entitled to a hearing on the alleged coercion by the trial court.

D. Williams

On January 23, 1956 at about 9:30 p.m. in Bronx County, one Mable Cummings was held up with a toy pistol, raped and robbed. McKinley Williams was indicted for five felonies on account of this occurrence. After discussing the plea with his lawyer, he pleaded guilty in the County Court, Bronx County, on March 16, 1956 to robbery in the second degree. He was sentenced on April 19, 1956 to a term of 7½ to 15 years.

More than eight years later, on August 28, 1964, Williams applied to the Supreme Court, Bronx County, for a writ of error *coram nobis* to vacate the conviction upon allegations that: (1) prior to his plea of guilty a confession was coerced from him by the police and (2) counsel representing him upon his plea was inadequate because he "knew" Williams was out of the state when the crime was committed and because he advised Williams that the crime to which he was pleading guilty was a misdemeanor. The application was denied by decision dated September 14, 1964.

The denial of *coram nobis* was affirmed without opinion by the Appellate Division, First Department (*People* v. *Williams,* 25 A. D. 2d 620) and leave to appeal to the Court of Appeals was denied.

Williams then applied for a writ of habeas corpus to the United States District Court for the Southern District of New York. He alleged that his guilty plea did not constitute a waiver of his right to challenge his allegedly coerced confession because at the time New York did not provide a constitutional procedure for testing the voluntariness of the confession. He also claimed that although his attorney knew he was not in the state when the crime was committed he recommended a guilty plea because the plea was to a misdemeanor. District Judge Croake held that the first claim was barred by *United States ex rel. Glenn* v. *McMann*, *supra*, and rejected the second claim after reviewing the minutes of plea, Williams' prior record and on the authority of *United States ex rel. Martin* v. *Fay*, 352 F. 2d 418 (2d Cir. 1965).

Opinions Below

The Court of Appeals viewed these cases as raising "the narrow question" of whether a District Court should apply the standards of *Townsend* v. *Sain*, 372 U. S. 293 (1963) in determining whether to hold an evidentiary hearing on the claim that a plea was not voluntary "because it was induced by the existence, or threatened use, of an allegedly coerced confession." While stating that the mere existence of a coerced confession was not enough to invalidate a later plea by a defendant represented by counsel, the Court paradoxically decided that an investigation as to whether or not the plea was voluntary must take account of such a claim. Moreover, a hearing was required in the federal courts where there had not been a "full and fair" hearing in the state courts on the issue.

The Court concluded that this holding was consistent with its decision in *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018 (2d Cir. 1965), *cert. denied* 383 U. S. 915

that a voluntary plea of guilty is a waiver of all non-jurisdictional defects. It asserted that that rule does not mean that an unconstitutionally coerced confession is never relevant to the issue of the voluntariness of the plea. The Court said that none of its previous decisions held that the waiver rule should operate to make an invasion of the defendant's constitutional rights irrelevant to the issue of the voluntariness of the guilty plea. The Court did not state how or why the claim was relevant to that issue either generally or in the specific context of the cases before it. Indeed, wrestle as it did with the factual allegations in each petition, the Court was unable to find a causal connection between the alleged illegality and the guilty pleas.

After reviewing its prior decisions, the Court set forth the following rule:

> "The rule should be stated: Where a petition for habeas corpus raises a claim that a guilty plea was not voluntary, the standards of *Townsend* v. *Sain* are applicable in determining whether to hold a hearing; and although the waiver rule means that an allegation that the petitioner's constitutional rights were violated before the plea was taken is not, standing alone, sufficient to call the validity of the plea into question, nonetheless if it is alleged that the plea was coerced in a manner spelled out in the petition, the alleged violations are not irrelevant to the issue of the voluntariness of the plea. An alleged violation of the constitutional rights is simply another factor to be taken into account in determining the voluntariness of the plea.
>
> On the other hand, the fact that the petitioner was represented by counsel and acted after consultation

> with counsel is also to be given substantial weight in determining the issue of voluntariness of plea."

The Court thus acknowledged that the role of the attorney in advising a plea was critical and speculated that even where there was evidence that a confession had been coerced, counsel might be justified in advising a defendant to plead "once a fair hearing by the state court had been held on a motion to suppress the confession and suppression has been denied." Although the opinion indicates that in other cases additional supporting materials such as the affidavit of the attorney who represented the petitioner or other exhibits or affidavits should be appended to the petition, the Court was satisfied from the petitions alone that the hearings were required.

The Court then cited that part of its decision in *United States ex rel. Rogers* v. *Warden,* 381 F. 2d 209 (2d Cir. 1967), which states that:

> "there is nothing inherent in the nature of a plea of guilty which, *ipso facto,* renders it a waiver of defendant's constitutional claims. Rather, waiver is presumed because ordinarily, such a plea is an indication by the defendant that he has deliberately failed or refused to raise his claims by available state procedures."

Relying on this language, the majority found that the only available state procedure by which these habeas corpus petitioners could have tested their confessions was the one declared retroactively unconstitutional in *Jackson* v. *Denno,* 378 U. S. 368. In the absence of a constitutionally acceptable procedure, the petitioners could not be deemed to have waived their coerced confession claims. Nor could they be deemed to have entered voluntary pleas of guilty

if the pleas were substantially motivated by coerced confessions, the validity of which they were unable, for all practical purposes, to contest. Only if it was found after a hearing either that the confession was voluntary or that the plea was not substantially motivated by the confession, could the conviction stand.

In the *Dash* case, the Court added that:

> "If it is found that there was no such threat by the the judge, and if the plea was freely made on advice of counsel because of the weight of the state's case aside from the confession, with apparent likelihood of conviction regardless of the confession, in a considered effort to obtain a lighter sentence, the Court may find the plea voluntary, and the conviction unassailable."

The Court viewed its holding as "apparently consistent" with at least the Third, Fifth, Sixth, Seventh, and Ninth Circuits.

In *Richardson*, the Court applied the rule of *Dash* and *Ross* after summarizing the allegations of the petition and setting forth the colloquy at the time the plea was entered. An evidentiary hearing was ordered on the ground that the colloquy was not necessarily conclusive on the question of whether the plea was voluntary and because of Richardson's claim that the plea was the result of the threatened use of a coerced confession which he had wanted to challenge but which his attorney had told him could be raised at another time.

In *United States ex rel. McKinley v. Williams*, the Court concluded that the *Ross* and *Dash* cases required that an evidentiary hearing be held where the petitioner alleged that the confession was the only evidence against him and that he had an alibi which his lawyer had refused to present to the Court. In *Williams*, there was also a claim that the petitioner did not know all the consequences of his plea.

In the *Ross* and *Dash* cases, there was a concurring opinion by Judge Kaufman relying on the decision of this Court in *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116. In support of the result reached by the majority, Judge Kaufman stated that when:

> "a petitioner alleges facts sufficient to support his claim that his guilty plea was substantially induced by the existence of a confession illegally obtained from him which he had no adequate means of challenging, and his allegations are not controverted by the record, we cannot avoid our duty—time consuming as it may be—to grant him a hearing. Of course, we are not suggesting for a moment that the writ should be sustained after such hearing. The petitioner must carry the burden of establishing that the coerced confession substantially motivated him in pleading guilty."

Chief Judge Lumbard, in a dissenting opinion, stated his conclusion that the guilty pleas of Ross and Dash were "entered knowingly and without coercion".

> "It is altogether clear that the defendants, after consulting with counsel, made an informed, deliberate and voluntary choice that their interests would be best served by pleading guilty to a lesser degree of the crime charged and by the likelihood that the sentence the Judge would impose would be less than if they were to stand trial and be convicted."

He went on to state that the hearings which would be required by the retroactive application of *Jackson* v. *Denno* would result "in profitless speculation and . . . an inquiry where no certain answers are possible" because of the virtual impossibility of reconstructing the prosecution's original case after the lapse of time.

Judge Lumbard presented statistics which showed that about 95% of all convictions are based on pleas of guilty.

He pointed out that the system is advantageous to all concerned and contended that if the decision to plead guilty could be placed in jeopardy many years later the State will have been deprived of a substantial part of the benefit of such a system. "Absent any fraud or overreaching existing at the time of the plea", neither the State nor the defendant should be able to reopen it. He acknowledged that

> "Were there any reason to suppose that injustice has resulted from the taking of guilty pleas in New York courts in cases where prisoners, represented by counsel, had confessed, further inquiry would at least be justified. But no such suggestion has been made; no cases of injustice are cited and so far as I am advised there have been no such cases."

Judge Lumbard stated that he would confine *Jackson* v. *Denno* to those cases in which New York had used a confession at trial over an objection that it was coerced on the theory that in the case of guilty pleas:

> "The unconstitutionality of the pre-*Jackson* procedure is relevant only for its supposed impact in deterring defendants from going to trial and thereby inducing their pleas of guilty. This impact, which would be virtually impossible to determine since it requires reconstructing the defendant's state of mind, is unquestionably remote and speculative. It cannot be doubted that the existence of the pre-Jackson procedure has had a far more remote effect on the reliability of the process for determining guilt . . . . in plea of guilty situations than it has had in cases which guilty went to trial"

Moreover, he pointed out that going to trial was not useless since even under that procedure some confessions were in fact held involuntary. Judge Lumbard then reviewed

the petitions in light of the majority holding and found that, even under those principles, Ross and Dash were not entitled to evidentiary hearings.

A dissenting opinion by Judge Moore questioned the applicability of the standards for holding habeas corpus hearings stated by this Court in *Townsend* v. *Sain*, 372 U. S. 293 (1963) to convictions based upon pleas of guilty. Judge Moore also stated that the majority had failed in its effort to state a rule which would aid the district courts in reviewing guilty pleas since it had purported to utilize motivation for pleading as the test and then proceeded to order a hearing in Ross where the facts were strongest for denying a hearing under that test.

The dissenting opinion written by Judge Friendly was premised on his determination that

> "No decision of the Supreme Court has held or even intimated that an accused who has been convicted upon a guilty plea, made on the advice of counsel after full explanation of its consequences and without coercion or trickery of any sort by the state, and thus 'voluntary' in the ordinary use of language, is entitled to have the conviction set aside because the plea was influenced in greater or less degree by a previous act of the state in violation of his constitutional rights."

He challenged the reliance of the majority on language from *Machibroda* v. *United States*, 368 U. S. 487 on the ground that that case involved an unkept promise regarding sentence and stated that a decision by this Court that Machibroda had alleged enough facts to require a hearing was not determinative of "the altogether different and highly important issue" raised in the instant cases. He challenged as well the majority's reliance upon *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116 as also involving the use of language as authority in total disregard of the context in which it was stated.

Judge Friendly criticized the majority for failing to set forth "intelligible guidelines" for when a hearing should be held or how the district courts should rule on petitions after holding hearings:

> "It is enough that the illegal confession was *a* factor or must it have been an *important* factor? And how can anyone tell? Isn't a confession almost inevitably an important factor except when the other evidence is overwhelming? Even if the standard were framed a bit more rigidly so as to require a showing that the plea would not have been made 'but for' the confession, the trial courts are being given a job impossible of successful performance."

Judge Friendly sharply disputed the likelihood that the rule of these cases would be limited to pre-*Jackson* confession cases since he did not find persuasive the argument that the pre-*Jackson* procedure was, in fact, so unfair as to influence a decision to plead, especially in view of the availability of federal habeas corpus to test the confession. Finally he observed that "[i]t is high time to recall that, even with respect to criminal defendants, a bargain is a bargain if made by an intelligent man with full protection of the court and on the advice of counsel".

Reasons for Granting the Writ

1. The decision below represents a significant departure from prior decisions of this Court.

How the prosecution obtains its evidence and why a defendant decides to plead guilty are mutually exclusive questions. Under every decision of this Court, the former question has had relevance only insofar as the evidence was in fact utilized at trial. Therefor, the validity of such

evidence may not be examined when a defendant collaterally attacks his plea of guilty. For, as this Court has held in *Kercheval* v. *United States*, 274 U. S. 220, 223:

> "A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence."

The Court below reached a contrary result solely by speculating, on the basis of the conclusory allegations in these petitions, that there is a causal connection between how evidence is obtained and the plea itself. This unreasoned and unfounded speculation should not be the basis for permitting a convicted defendant to repudiate his guilty plea by way of federal collateral attack, especially since the Court has provided no comprehensible standards for determining whether or not a plea is voluntary. The rule as stated insures the likelihood of amorphous collateral evidentiary hearings in the vast majority of all final state judgments of conviction, past and future. The literally staggering impact of such a result demonstrates the urgency of the instant petition.

It is by no means urged that a guilty plea is never open to collateral attack, but it is urged that the nature of that attack must be directed to whether the plea was knowingly and voluntarily made "after proper advice and with full understanding of the consequences." *Kercheval* v. *United States, supra* at 223; *Waley* v. *Johnston*, 316 U. S. 101; *Walker* v. *Johnston*, 312 U. S. 275. Thus, a knowing plea traditionally is entered when the defendant understands the nature of the charge against him, knows that he can go to trial and put the prosecution to its case and appreciates the consequences of his plea, including the waiver of any

defense he might have. The fact that the situation has been explained to a defendant by counsel acting in his behalf is a critical factor in determining the knowing nature of the plea. *Cf. Walker* v. *Johnston, supra; Von Moltke* v. *Gillies,* 332 U. S. 708. If the plea is a result of a bargain which is not kept, it cannot be said that it was entered with knowledge of the consequences. Similarly, a plea is voluntary where it has not been entered as the result of any threats or promises overbearing the will of the defendant and forcing him to act against his choice. *Machibroda* v. *United States,* 368 U. S. 487; *United States* v. *Tateo,* 214 F. Supp. 560 (S.D.N.Y. 1963).

Certainly, a trial court should not accept a guilty plea which is not knowingly and voluntarily offered. The nature of the inquiry which should be made is evidenced (although not constitutionally mandated) by Fed. R. Cr. Proc. 11 which provides:

> "A defendant may plead not guilty, guilty, or with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty, *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead guilty or if a defendant corporation fails to appear the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

According to this Court:

> "[T]he Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to the voluntariness determination." *McCarthy* v. *United States,* —— U. S. ——, 37 U.S.L. Week 4285, 4287 (April 2, 1969).

The nature of the evidence available to the prosecution forms no part of the inquiry. Under the decisions below however, the most scrupulous compliance with Rule 11 would not prevent collateral inquiry into matters not relevant to the nature of the plea itself. *McCarthy* v. *United States, supra* at 4287. As Judge Friendly pointed out in dissent: "Despite superficial similarity this issue is actually quite different from determining whether a plea of guilty was 'voluntary' in the traditional sense." The factors considered in the colloquy at the time of the offer of the plea should ordinarily be dispositive of any claimed defect in the plea (see *United States ex rel. Martin* v. *Fay*, 352 F. 2d 418 [2d Cir. 1965]; *United States* v. *Shillitani*, 16 F.R.D. 336 [S.D.N.Y. 1954]), but under the Rule below, they never could. Significantly, the Court below entirely ignored the colloquies in all of the instant cases, except *Richardson*.

As a practical matter, any plea is "induced" by such factors as the likelihod of conviction, possible defenses and challenges to the prosecution's case, the possibility of a plea to a reduced charge and the possibility of a more lenient sentence. It is for the defendant and his lawyer to weigh the alternatives; it is not for the Court to weigh the evidence in lieu of a trial in order to advise a defendant of the sure outcome should he decide to go to trial. Once the plea is freely decided on, it operates as a waiver of all non-jurisdictional defects. *McCarthy* v. *United States, supra; United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018 (2d Cir. 1965), *cert. denied* 383 U. S. 915.

While evidence may induce a plea, its nature and probative value do not. The only appropriate way to test evidence is by challenge at the time it is offered at a trial. Indeed, the belief that material evidence is open to challenge is a strong inducement to proceed to trial.

To claim that the belief that evidence has been illegally obtained taints the alternatives available to the defendant

and thus infects the plea (*cf. Harrison* v. *United States*, 392 U. S. 219), begs the question. The only resolution of such a claim would be to afford to pleading defendants the same forum as non-pleading defendants and leave them, by virtue of a probable reduced charge or sentence, with the best of both worlds while requiring the courts, in effect, to conduct trials or lengthy proceedings in all cases. All of the instant cases, it must be recalled, involve *alleged* illegality, not established misconduct. Contrast *Fay* v. *Noia*, 372 U. S. 391.

That the Circuit Court failed to recognize the nature and effect of a guilty plea is evidenced by its reliance on the language in its own decision in *United States ex rel. Rogers* v. *Warden*, 381 F. 2d 209 (2d Cir. 1967), to the effect that: "There is nothing inherent in the nature of a plea of guilty which *ipso facto* renders it a waiver of defendant's constitutional claims" (*Id.* at 213). This language, of course, flatly contradicts the holdings of this Court in *Kercheval* v. *United States*, *supra* at 223 and *McCarthy* v. *United States*, *supra* at 4287. The Court went on in the *Rogers* case to hold that, because New York afforded defendants who pleaded guilty an opportunity to test on appeal the accuracy of an adverse determination of a pretrial motion to suppress evidence (N. Y. Code Crim. Proc. § 813-c), the issue had not been "'waived'" for federal habeas corpus purposes notwithstanding the fact that no direct attack was made on the plea of guilty. The Second Circuit is thus the only federal appellate court which accords relief to a petitioner who has pleaded guilty but seeks later to raise an evidentiary claim not even connected with the plea.

Although in *Rogers*, the Court claimed that its decision was limited to the unique New York procedure, it has employed the same erroneous "waiver" rationale to the instant cases. By this rationale the Second Circuit has

created the untenable situation of assessing waiver of a claim by reaching the merits of the very issue which is claimed to be waived. Obviously, the merits of a claim have no relevance to why it was or was not raised except as it may be believed to be without merit.

The dilemma is apparent; the confusion and impact incalculable. To escape the dilemma, the Court of Appeals purports to hold that the mere claim that illegally obtained evidence induced the plea is not sufficient to mandate a hearing or invalidate the plea. This, however, is not the result of their decisions. Typically, a claim that evidence "induced" the plea will be coupled with a claim that counsel in some manner either failed to explain or appreciate the evidentiary considerations. In such circumstances, it seems clear, the holdings below would require evidentiary exploration of the allegations and a belated collateral assessment of whether or not counsel was in fact correct. If he was, the matter seems to be at an end. However, such an inquiry bears no relation to the understanding nature of the plea and is simply the evidentiary hearing on the purportedly waived claim. If counsel was not correct, then there must be a hearing on "substantial motivation", a highly speculative inquiry at which the petitioner's testimony is a foregone conclusion. To rebut it, the State would have to produce the case it had abandoned in midstream perhaps many years before. If the hearing is to concern itself with the understanding nature of the plea, then the inquiry would be directed to the traditional voluntariness factors already considered and the evidence again would be irrelevant except as it provides a springboard for ordering a hearing while playing no part in the hearing itself. The Second Circuit does not specify the direction a hearing should take but obviously, under any view, the evidentiary allegation plays no part. This is also obvious from the fact that, in each case, the Second Circuit found other grounds to be considered at a hearing although

these are almost all related to the evidentiary claim. In any event, the evidentiary claim is clearly the basis for all of the decisions and all of the allegations were wholly conclusory.

The absence of any adequate guidelines for the mandated hearings was succinctly set forth by Judge Friendly in his dissenting opinion:

> "The court gives almost no aid concerning the standard for ruling on petitions after a hearing has been held. Is it enough that the illegal confession was *a* factor or must it have been an *important* factor? And how can anyone tell? Isn't a confession almost inevitably an important factor except when the evidence is overwhelming? Even if the standard were framed a bit more rigidly so as to require a showing that the plea would not have been made but for the confession, the trial courts are being given a job impossible of successful performance."

In short, the Second Circuit has failed completely, in mandating wholesale hearings, to appraise the district courts of the ultimate fact in issue.

It is clear from the opinions below, moreover, that the assessment of voluntariness is to be made on the basis of the law at the date of the petition for collateral relief, and not at the date of the plea itself. Thus, the Court relies upon the unconstitutionality of the procedure for testing confessions which existed at the time of the guilty pleas in these cases. By doing so, it jeopardizes all guilty pleas in New York prior to June 22, 1964, where a confession allegedly formed a substantial part of the evidence. However, these are not cases in which there was any doubt at the time about the right to attack the legality of a confession. *Cf. United States ex rel. Carafas* v. *LaVallee*, 334 F. 2d 331 (2d Cir. 1964), *cert. denied* 381 U. S. 951 (1965). Long before these defendants' convictions and this Court's decision in *Jackson* v. *Denno*, *supra*, it had been settled that involuntary confes-

sions could not be introduced in evidence at state or federal trials. And at the time of the instant convictions, the "New York" system for testing voluntariness had gained the sanction of state and federal courts (*Stein* v. *New York*, 346 U. S. 156), was considered valid, and was commonly utilized by defendants who had *bona fide* claims of inadmissibility. Moreover, it was entirely possible in each of these cases that the trial judge might have found the confession voluntary or involuntary as a matter of law, thereby never reaching the *Jackson* problem. Or, the confessions might not have been introduced at all. Therefore, it is not "accurate to say that going to trial and contesting the voluntariness of their confessions was a useless procedure for defendants who claimed that their confessions had been coerced." Dissenting opinion of Chief Judge Lumbard. In any event, as Circuit Judge Friendly observed in his dissent to the instant cases:

> "While the procedure prescribed by Jackson is a substantial improvement, the previous New York practice was a long way from denying an accused a reasonable opportunity to have the validity of his confession determined. The majority in Jackson conceded that New York's belief in the fairness of its procedure was 'not without support in the decisions of this Court', 378 U. S. at 395 notably *Stein* v. *New York*, 346 U. S. 156 (1953), and four Justices found nothing constitutionally wrong with it. Furthermore, there was always the opportunity to resort to federal habeas corpus in the event of conviction and to have the voluntary nature of the confession tested there. The case where a defendant otherwise willing to stand trial was forced into a guilty plea by the difference between pre-Jackson and post-Jackson procedures with respect to confessions, is thus a construct of the fertile brains of defense lawyers without counterpart in reality."

In the instant cases, for example, only Williams raised the issue in his petition.

See also *Pinto* v. *Pierce*, 389 U. S. 31 (1967) in which this Court emphasized that it "has never ruled that all voluntariness hearings must be held outside the presence of the jury, regardless of the circumstances."

Thus, it is only the wisdom of hindsight which enabled the Circuit Court to characterize a defendant's submission to the *Stein* procedure as a "hazard" and to conclude that the pleas in each of these cases were "substantially motivated by * * * coerced confession[s] the validity of which [the defendants were] *unable, for all practical purposes, to contest.*" (Emphasis supplied.)

The net effect of relying upon the subsequent unconstitutionality of the State procedure is to place the defendant who pleaded guilty in a better position than his counterpart who went to trial and who failed to object to introduction of the confession (*People* v. *Huntley*, 15 N. Y. 2d 72 [1965]; *United States* v. *Indiviglio*, 352 F. 2d 276 [2d Cir. 1965], *cert. denied* 383 U. S. 907) when no reason exists for drawing such a distinction. In neither case has the defendant made a record which is capable of review. Moreover, the inequity created by the distinction is in itself a reason why persons who challenge their guilty pleas should not be able to rely *at all* upon the alleged unconstitutionality of evidence.

Indeed, to the extent that the Court below found a pretrial motion to suppress constitutionally mandated, its holding conflicts with *Jackson* v. *Denno*, itself, which specifically recognized that a forum for testing a confession could be provided during the trial itself. 378 U. S. at 378 n. 8, 386 n. 13. The Court below held, however, that a plea could not safely be advised until "a fair hearing by the state court has been held on a motion to suppress the confession and suppression has been denied * * *".

This conflict with *Jackson* effectively elevates §§ 813-c, g of the New York Code of Criminal Procedure to a constitutional requirement. Sections 813-c, g provide for such a pre-trial motion to be made to test, respectively, the legality of evidence which has been seized and of confessions which the prosecution intends to introduce (§ 813-f).* However, the enactment of these provisions was not constitutionally required. This Court has never announced a requirement that a defendant know *prior to pleading* whether or not the evidence which may be used against him at trial is constitutional. All that is required as a matter of due process is that there be an opportunity to test the evidence at *some* time. Significantly, in conflict with its holding in the instant cases, the Second Circuit in *United States ex rel. Rogers* v. *Warden*, 381 F. 2d 209 (2d Cir. 1967) *itself* recognized that §§ 813-c and g are not constitutionally required.

To the extent that the instant opinions mandate a pre-trial hearing they also may require an appeal from the judgment entered upon a plea after denial of the motion, as the New York statute provides. For if the defendant is entitled to collateral review, *a fortiori* he would be entitled to appellate review.

Moreover, the rationale of the Second Circuit rule, by looking at the law as of the date of the petition, would give retroactive effect to exclusionary rules which this Court has held are not retroactively applicable to the defendant who chose to go to trial, *e.g.*, in the case of searches which took place before *Mapp* v. *Ohio*, 367 U. S. 643 (1961) or statements given prior to *Miranda* v. *Arizona*, 384 U. S. 436 (1966) and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). For to the extent that a reviewing court may take into

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* Section 813-c became effective in April, 1962 and § 813-g became effective in July, 1965. Prior to their enactment the evidence in issue could only be challenged upon its introduction at trial.

account an allegation that the plea was induced by certain evidence it is logically irrelevant whether or not that evidence was regarded as constitutional at the time. And, of course, the holdings below would permit an attack on a guilty plea to take into account an allegation that the plea was induced by the existence and threatened use of such unconstitutional evidence as identification on the basis of an improper lineup (*Stovall* v. *Denno*, 388 U. S. 293 [1967]) or introduction of a co-defendant's confession (*Bruton* v. *United States*, 391 U. S. 123). This result necessarily follows from the reliance of the Second Circuit on the fact that the *Stein* procedure was subsequently held to be inadequate in *Jackson* v. *Denno*, *supra*.

2. The impact of the holdings below on past and future cases is substantial, especially in view of their conflict with New York law.

As Chief Judge Lumbard pointed out, the percentage of state court convictions resting on guilty pleas is enormous. Moreover, the percentage of federal convictions resting on such pleas is comparable (*McCarthy* v. *United States*, —— U. S. ——, 37 U. S. L. Week 4286, n. 7). It must be assumed that in a large proportion of such convictions there is either a statement or tangible evidence which can be made the subject of an effort to suppress, albeit a frivolous effort. If evidentiary hearings, after conviction, are to be held on a claim not raised before conviction, the burden on the courts will surpass comprehension.

When the holdings below are coupled with the fact that they are retroactive in their application, the impact is even more overwhelming. As we have suggested, *supra*, p. 22, the State, which in each case discontinued its prosecution in reliance upon the defendant's action, must attempt to reconstruct its case at a later date of the defendant's choosing. The difficulties inherent in this are all too obvi-

ous. Witnesses may have died. The defendant's attorney may no longer be available. It is not inconceivable that there are cases in which the relevant records fail to disclose whether or not evidence was actually seized or a confession given. One such example is the case of an oral statement.

The opportunities for fabrication are similarly obvious. As Circuit Judge Friendly noted:

> "A hearing must be had whenever a prisoner makes 'particularized allegations as to how that confession rendered his plea involuntary.' This test will speedily become well known in the prisons and is exceedingly easy to meet; the error made by the relator in *United States ex rel. Rosen* v. *Follette*, decided herewith, will not be repeated."

Moreover, many cases each year are litigated in the state courts on the grounds now deemed adequate by the Second Circuit to raise a triable issue. These are rejected as a matter of law by the New York courts on the authority of *People* v. *Nicholson*, 11 N. Y. 2d 1067 (1962), and there is no indication that New York has any intention of abandoning that rule. Significantly, even the dissenters in *People* v. *Dash*, 16 N. Y. 2d 493, did not rely on the evidentiary claim.

The Second Circuit stated that it found its rule to be apparently consistent with that of at least five other circuits. But see: *Watts* v. *United States*, 278 F. 2d 247 (D. C. Cir. 1960); *Moore* v. *Rodriguez*, 376 F. 2d 817 (10th Cir. 1967); *Lattin* v. *Cox*, 355 2d 397 (10th Cir. 1966); *Sims* v. *United States*, 272 F. Supp. 577 (D. Md. 1966), affd. 382 F. 2d 294 (4th Cir. 1967). Moreover, the purported consistency in the Circuits relied on is superficial. Virtually every jurisdiction agrees that a voluntary plea of guilty waives all non-jurisdictional defects. Each jurisdiction,

however, takes a different approach to the additional allegation of "inducement" and even within each circuit the approaches are not uniform. Compare, *e.g.*, *Reed* v. *Henderson*, 385 F. 2d 995 (6th Cir. 1967) with *Humphries* v. *Green*, 397 F. 2d 67 (6th Cir. 1968); *Carpenter* v. *Wainwright*, 372 F. 2d 940 (5th Cir. 1967) with *Busby* v. *Holman*, 356 F. 2d 75 (5th Cir. 1966); and *Doran* v. *Wilson*, 369 F. 2d 505 (9th Cir. 1966) with *Thomas* v. *United States*, 290 F. 2d 696 (9th Cir. 1961).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York, May 23, 1969.

Respectfully submitted,

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APPENDIX A

District Court Opinions—Ross.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

May 25, 1967

UNITED STATES OF AMERICA ex rel. WILBERT ROSS,

Relator,

against

DANIEL McMANN, as Warden of Clinton Prison, Dannemora, New York,

Respondent.

MEMORANDUM AND ORDER

The relator, now in State custody, seeks a writ of habeas corpus.

PERTINENT ALLEGATIONS IN THE PETITION

In May, 1954, while in State custody, the relator was taken to the office of the District Attorney and questioned about the commission of a murder; he was coerced into signing a statement, confessing the crime; his request to be permitted to consult with his attorney was refused and he was not advised of his right to remain silent;

In October, 1954, he was arraigned on an indictment, charging him with the commission of first degree murder;

Five or six weeks later, he requested his court appointed lawyer, Mr. Harvey Strelzin, to seek the return of the con-

fession; Strelzin urged that no such action be taken; if he persisted in demanding a trial, Mr. Jenkins, a witness for the People would testify against him and he would get the chair;

In February, 1955, he was brought into court, represented by counsel, and informed that the District Attorney was willing to accept a plea to second degree murder and that his sentence would be twenty years to life; he thereupon pleaded guilty to that charge;

March 14, 1955, judgment of conviction was entered, including a sentence of forty-five years to life;

March 23, 1965 (ten years later) he verified a petition for coram nobis, seeking the vacating of the judgment of conviction;

May 21, 1965, the petition was denied without a hearing;

May 24, 1965, the order thereon was entered;

June 10, 1965, reargument of the motion was granted;

Sept. 15, 1965, the original decision was adhered to;

July 5, 1966, The Appellate Division of the Supreme Court, Second Department, affirmed the said order.

Jan. 10, 1967, leave to appeal to the State Court of Appeals was denied;

No appeal was taken directly from the judgment of conviction.

THE GROUND URGED IN SUPPORT OF THE PRESENT PETITION

That the relator's plea of guilty was involuntary and induced by threats.

Appendix A

A Plea of Guilty Constitutes A Waiver of All Non Jurisdictional Defects In Any Prior Stage of Proceedings Against A Defendant, Including Defects In A Preliminary Hearing

In United States ex rel. Glenn v. McMann, 349 F. 2d 1018, 1019, the court stated:

> "Appellant claims that his plea of guilty was unconstitutionally coerced by the existence of a confession that had been wrung from him involuntarily. * * *
>
> "A voluntary guilty plea entered on advice of counsel is a waiver of all nonjurisdictional defects in any prior stage of the proceedings against him. * * *
>
> "Petitioner's motions are denied. The respondent's cross-motion to dismiss the appeal is granted."

Petitioner Glenn's application to the Supreme Court of the United States for a writ of certiorari was denied. See United States ex rel. Glenn v. McMann, 383 U. S. 915.

People v. Nicholson, 11 N Y 2d 1067, decided July 6, 1962, cited and relied upon by the relator fails to support his position. The court therein, at page 1068, said:

> "A defendant who has knowingly and voluntarily pleaded guilty may not thereafter attack the judgment of conviction entered thereon by coram nobis or other post-conviction remedy on the ground that he had been coerced into making a confession and that the existence of such coerced confession induced him to enter the plea of guilty. If a defendant desires to contest the voluntariness of his confession, he must do so by pleading not guilty and then raising the point upon the trial; he may not plead guilty and then, years later, at a time when the prosecution is perhaps unable to prove its case, assert this alleged constitutional vio-

lation. The issue as to whether the confession was illegally obtained is waived by the guilty plea."

The Nicholson case, supra, was cited with approval in People v. Dash, 16 N Y 2d 493, decided April 22, 1965.

The Court concludes that the relator's motion lacks merit and that the petition should be dismissed. The papers will be filed without payment of fees.

A copy hereof is being mailed to the respondent for delivery to the relator.

WALTER BRUCHHAUSEN

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United States District Judge

Appendix A

District Court Opinions—Dash.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. FOSTER DASH,

Petitioner,

against

HON. HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, N. Y.,

Respondent.

CANNELLA, J.

Petitioner's pro se application for a writ of habeas corpus is denied.

Petitioner was indicted together with three defendants for robbery in the first degree, grand larceny and assault on February 9, 1959.

On April 6, 1959, together with one co-defendant, the petitioner pleaded guilty to robbery in the second degree and was sentenced as a second offender to a term of 8 to 12 years on August 3, 1959. Two separate coram nobis applications were denied on January 29, 1963 and February 26, 1963, respectively. The grounds raised are similar to the ones raised in this petition. The orders were affirmed by the Appellate Division, First Department, 21 A. D. 2d 978, and affirmed by the New York Court of Appeals, 16 N. Y. 2d 493.

Petitioner alleges: (1) that his plea of guilty was the product of a coerced confession. (2) that his plea of guilty was coerced by the trial court by telling him he would get the maximum penalty if found guilty after trial.

Appendix A

In regard to the first contention, it is well settled that a voluntary plea of guilty entered on advice of counsel constitutes a waiver of all non-jurisdictional defects in any prior stage of the proceedings against the defendant. *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018 (2d Cir. 1965); *United States ex rel. Swanson* v. *Reincke*, 344 F. 2d 260 (2d Cir. 1965); *United States ex rel. Boucher* v. *Reincke*, 341 F. 2d 977 (2d Cir. 1965). Petitioner therefore cannot succeed on the basis of his first contention.

With respect to the second contention it appears that the prosecutor in the state court proceedings filed an affidavit in which he categorically stated that the trial judge never threatened the defendant. See, *People* v. *Dash*, 16 N. Y. 2d 493 (1965).

Further the transcript relating to the entry of petitioner's plea of guilty clearly indicates that the defendant made an intelligent and uncoerced choice and that no promises or threats were made to him.

So ordered.

Dated: February 2, 1966.

s/ John M. Cannella

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U. S. D. J.

Appendix A

District Court Opinions—Richardson.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. WILLIE RICHARDSON,

Petitioner.

against

WARDEN OF CLINTON PRISON,

Respondent.

MEMORANDUM DECISION AND ORDER

BRENNAN, Judge

This is another of the now prevalent applications for a writ of habeas corpus directed to this court by a state court prisoner and based upon the contention that his plea of guilty to a reduced charge in a state court is invalid because same was induced by an alleged coerced confession.

It is alleged in the petition that on or about March 24, 1963 the petitioner attempted to act as a peacemaker in an altercation between two relatives, each of whom died as the result of stab wounds inflicted upon them. Upon petitioner's arrest, he was brought to the police station and after questioning, he signed a confession implicating himself in the homicides involved. He alleges in a conclusive manner that his statement or confession resulted diretely from police coercion after he had requested and been denied the right to communicate with an attorney. Petitioner was subsequently indicted in a two count indictment which

charged him with the crime of murder in the first degree. Two attorneys were assigned as counsel to represent the petitioner and on July 22, 1963 in the presence of such counsel, he entered a plea of guilty to the crime of murder in the second degree upon the first count of the indictment and to cover the second count thereof. He was thereafter sentenced to be confined for from thirty years to life and is detained under the resulting commitment.

On or about June 30, 1964, petitioner sought by motion in the state court to vacate the judgment of conviction upon the contention that his plea was induced by the fact that he had been coerced into confessing his guilt. Relief was on July 27, 1964 denied in the state court upon the authority of Peo. v. Nicholson, 11 N. Y. 2d 1067. An appeal was taken. The action of the lower court was affirmed without opinion on May 27, 1965. Peo. v. Richardson, 23 A. D. 2d 969. Permission to appeal to the Court of Appeals was denied June 8, 1965. This application, verified July 2, 1965, followed.

The present application fails on its face to show that the contention, now advanced, had been presented to the state courts and in order to establish the fact, the petitioner has loaned to this court copies of the appellant's and respondent's briefs in the Appellate Division which show that the present contention was in fact submitted to that court. It is therefore concluded that state court remedies have been exhausted.

Through the cooperation of the Attorney General and the District Attorney of the County of New York, a photostat transcript of the minutes of the proceedings in the Supreme Court, New York County, on July 22, 1963, when petitioner's plea was entered and on October 9, 1963 when sentence was imposed, have been made available by the District Attorney of New York County. The petition, together with the documents mentioned above, are before

this court in the matter of the determination of the question as to whether the requested writ should issue. They are held to be sufficient to conclude that petitioner's plea was voluntarily entered and that no hearing is necessary. U. S. ex rel. McGrath v. LaVallee, 319 F. 2d 308 at 312 and cases cited. The facts disclosed will be briefly discussed.

As already indicated, the petitioner was represented by assigned counsel at the pertinent times involved. There is no allegation that such representation was ineffective. There is no allegation that petitioner was acting in any manner under either a physical or mental handicap. That petitioner was experienced in the matter of law violations is apparent from the allegation of the petition which contains a reference to him as a parolee at the time of the incident involved.

The transcript of the proceeding had at the time of the entry of the decree is somewhat lengthy and it is difficult to understand from a reading thereof how any court could have taken additional safeguards to make certain that the plea was voluntarily and understandingly entered. Request was made by counsel to withdraw the "not guilty" plea previously entered and to plead guilty to Count 1 of the indictment. After the court requested that the petitioner pay attention, he repeated the request of counsel made above. The petitioner indicated that such course of action was desired by him and that he had discussed same with both counsel. In answer to the court's question as to whether or not he had been threatened or whether promises had been made to him as to the sentence to be imposed, the petitioner replied in the negative. On two occasions, he advised the court that the taking of the plea was of his "own free will and volition". The court then asked the following question "Now, did you, on or about March 24, 1963 in the County of New York, wilfully and

feloniously strike Rosalie Smith with a knife, thereby causing her death?" The defendant replied "Yes, sir." The court then took the plea. It is impossible for this court to understand how the trial judge could have more conclusively established that the plea of guilty was both understandingly and voluntarily entered. Almost three months later, when sentence was imposed, although opportunity was afforded, the petitioner raised no question as to the validity of his plea. Here the petitioner received the benefit of a plea to a reduced charge and the quashing of a further charge of a capital offense. He is now apparently dissatisfied with the bargain. The circumstances indicate that subsequent post-conviction attempts to obtain relief were the result of an afterthought prompted, no doubt, by legal education afforded during petitioner's subsequent confinement.

The law requires little discussion. This court is not required to blindly accept the allegation of the petition as presumptively valid. Edge v. Wainwright, 347 F. 2d 190. This rule would seem to apply, where a state of mind appears to be contradicted by a showing of the facts. It has long been held that a voluntary guilty plea, entered upon advice of counsel, is a waiver of all non-jurisdictional defects in any prior stage of the proceedings against a defendant in a criminal case. This principle has been recently repeated by our Circuit Court of Appeals in U. S. ex rel. Glenn v. McMann, decided August 26, 1965 and in U. S. ex rel. Martin v. Fay, decided November 8, 1965. A reference to the opinion in U. S. ex rel. Glenn v. McMann, supra, would indicate that petitioner's reliance upon the language in U. S. ex rel. Vaughn v. LaVallee, 318 F. 2d 499, is misplaced. The decision here, that the state court record is sufficient and satisfactory for the determination of the issues involved (see U. S. ex rel. McGrath v. LaVallee, supra, at page 312), may well rest upon the statement

found in U. S. ex rel. Martin v. Fay, supra, to the effect that the facts and circumstances including the colloquy between the judge, who took the plea and imposed the sentence, and the petitioner are decisive in denying substance to the petitioner's present contention.

The court's attention is just called to the fact that although the transcript of the state court proceedings, referred to, seems to be a photostat of the original, same is not certified. There is no reason for this court to doubt the correctness or the completeness of such transcript but it is deemed advisable to return same to the District Attorney of New York County with the request that same be certified and returned to this court when it will be filed as a part of the record in this proceeding. The briefs, loaned by the petitioner and referred to above, will be returned to him with the understanding that if an appeal is to be taken from this decision, that same must be made available to the appellate court.

For the reasons indicated above, it is

ORDERED the application be and the same is, hereby denied.

STEPHEN W. BRENNAN,
Senior U. S. District Judge.

Dated: December 2, 1965.

Appendix A

District Court Opinions—Williams.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66-Civ. 2304

UNITED STATES OF AMERICA ex rel.
MCKINLEY WILLIAMS,

Relator,

v.

HAROLD W. FOLLETTE, as Warden of
Green Haven State Prison,

Respondent.

CROAKE, District Judge

MEMORANDUM

In a memorandum decision filed on September 13, 1966, the petition of the relator for a writ of habeas corpus was dismissed by ths court for failure to exhaust state remedies. Relator now moves for reargument. Since it appears from the additional papers filed upon the instant application that the exhaustion requirement should be held to have been complied with in the circumstances, the motion for reargument will be granted. The September 13 order is to be vacated and the petition will be considered upon the merits.

In his petition, relator urges that his conviction be set aside on the grounds that a confession was coerced prior to his plea of guilty, and that he should not be deemed to have waived his right to challenge the confession, because,

under the then existing procedure for determining the voluntariness of confessions, he could not have had a fair trial. Relator supports this ingenious argument by relying on *Jackson* v. *Denno*, 378 U. S. 368 (1964), the case which invalidated the New York procedure for determining the voluntariness of confessions.[1]

The arguments in support of the application have been carefully considered and it appears that the petition should be and is denied. As the court of appeals said in *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018, 1019 (2d Cir. 1965): "A voluntary plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings."[2] *Accord, United States ex rel. Martin* v. *Fay*, 352 F. 2d 418 (2d Cir. 1965). Under the circumstances alleged herein, this court is of the opinion that the plea of the relator was not involuntary. It is clear from the papers submitted that the disputed plea was made in open court with counsel present.[2]

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[1] The ingenuity of the relator is further evidenced by the manner in which he "satisfied" the requirement that state remedies be exhausted before seeking relief in federal court. When the petition to this court was originally filed, the affidavit of the attorney general stated that petitioner had an appeal from the denial of a coram nobis application pending in the New York courts. To verify this, the court, sua sponte, requested an affidavit from the attorney general. The attorney general complied, and together with an affidavit submitted a photostatic copy of the notice of appeal. The relator received a copy of the affidavit and of the notice of appeal, whereupon he forthwith withdrew the pending appeal. Parenthetically, it might be observed that the relator has brought six coram nobis proceedings in the New York courts.

[2] The assertion by the relator that his attorney informed him that he would be pleading guilty to a misdemeanor rather than to a felony is not sufficient for this court to grant the relator's request for relief, in light of the decision in *Martin, supra*, of the colloquy between the court and the defendant at the time of the plea, and of the prior experience of the relator with the law as indicated by his record.

Appendix A

It should be further noted that the plea of guilty by this relator was made in March 1956, some eight years before the *Jackson* decision (1964), in which the procedure then pursued in the New York courts to determine the voluntariness of a confession was declared unconstitutional.[3] It is most difficult, therefore, to accept the assertion that the right to go to trial was relinquished because he believed he would not receive a fair determination on the issue of voluntariness.

Accordingly, the petition is denied.

So Ordered.

Dated: New York, N. Y.
October 26, 1966

Thomas F. Croake

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[3] *People* v. *Huntley*, 15 N. Y. 2d 72 (1965), the case which implemented *Jackson* v. *Denno*, provides for a separate hearing on the issue of voluntariness only as to those cases which have gone to trial.

APPENDIX B

Circuit Court Opinions—Ross and Dash.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

September Term, 1967.

(Submitted to the court
in banc October 17, 1968 Decided February 26, 1969.)

No. 492—Docket No. 32140

UNITED STATES OF AMERICA *ex rel.* WILBERT ROSS,
Relator-Appellant,

—v.—

DANIEL MCMANN, as Warden of Clinton Prison,
Dannemora, New York
Respondent-Appellee.

No. 540—Docket No. 30420

UNITED STATES OF AMERICA *ex rel.* FOSTER DASH,
Petitioner-Appellant,

—v.—

THE HON. HAROLD W. FOLLETTE, Warden of Green Haven
State Prison, Stormville, New York,
Respondent-Appellee.

Before:

LUMBARD, Chief Judge,
WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN,
HAYS, ANDERSON and FEINBERG, *Circuit Judges.*

Appendix B

United States ex rel. Ross v. *McMann* was argued May 9, 1968 before Lumbard, *Chief Judge*, and Smith and Anderson, *Circuit Judges*.

United States ex rel. Dash v. *Follette* was argued on June 21, 1968 before Moore and Friendly, *Circuit Judges*, and Bryan, *District Judge*.

Since similar issues of importance in determining state prisoner habeas corpus applications were involved in these cases, and in No. 32264, *United States ex rel. Oscar Leon Rosen* v. *Follette*, the court on October 17, 1968 ordered the three cases considered *in banc*.

Appeal in *United States ex rel. Ross* v. *McMann* from judgment of the United States District Court for the Eastern District of New York, Walter Bruchhausen, *Judge*, dismissing without hearing application of state prisoner for writ of habeas corpus. Reversed and remanded.

THOMAS D. BARR, New York, N. Y. (Duane W. Krohnke, New York, N. Y., on the brief), *for relator-appellant*.

JOEL LEWITTES, Asst. Attorney General, State of New York (Louis J. Lefkowitz, Attorney General, and Samuel A. Hirshowitz, First Asst. Attorney General, on the brief), *for respondent-appellee*.

Appeal in *United States ex rel. Dash* v. *Follette* from order of the United States District Court for the Southern District of New York, John M. Cannella, *Judge*, denying

without hearing petition of state prisoner for writ of habeas corpus. Reversed and remanded.

Gretchen Wiers Oberman, New York, N. Y. (Anthony F. Marra, New York, N. Y., on the brief), *for petitioner-appellant.*

Mortimer Sattler, Asst. Attorney General, State of New York (Louis J. Lefkowitz, Attorney General, and Samuel A. Hirshowitz, First Asst. Attorney General, on the brief), *for respondent-appellee.*

Smith, *Circuit Judge* (with whom Judges Waterman, Kaufman, Hays, Anderson and Feinberg concur):

United States ex rel. Ross v. *McMann* is an appeal from a dismissal without hearing of an application by a state prisoner for writ of habeas corpus in the District Court for the Eastern District of New York, Walter Bruchhausen, *Judge*. Relator, confined in a New York State prison for a term of 45 years to life on conviction upon plea of guilty to murder in the second degree, petitioned the Supreme Court of the State of New York for Kings County for a writ of error *coram nobis* on the ground that his guilty plea was induced by coerced confessions. The writ was denied without a hearing, the decision affirmed without opinion by the Appellate Division, *People* v. *Ross*, 272 N. Y. S. 2d 969 (2d Dept. 1966) and leave to appeal denied by the New York Court of Appeals.

The District Court entertained the application for writ of habeas corpus, and dismissed the petition without a hearing on the ground that "a voluntary guilty plea en-

tered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings against him," relying on *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018 (2 Cir. 1965), cert. denied 383 U. S. 915 (1966). In his complaint and supplemental affidavit Ross alleges that he pleaded guilty because his attorney had refused to attempt to suppress a confession which had been illegally obtained from him and had warned him that if he risked a trial, the confession and other evidence against him would surely lead to his conviction for first degree murder and sentence to the electric chair.[1] We hold that

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[1] Judge Bruchhausen in his opinion recited some of Ross' allegations, including the following:

"In May, 1954, while in State custody, the relator was taken to the office of the District Attorney and questioned about the commission of a murder; he was coerced into signing a statement, confessing the crime; his request to be permitted to consult with his attorney was refused and he was not advised of his right to remain silent;

"In October, 1954, he was arraigned on an indictment, charging him with the commission of first degree murder;

"Five or six weeks later, he requested his court appointed lawyer, Mr. Harvey Strelzin, to seek the return of the confession; Strelzin urged that no such action be taken; if he persisted in demanding a trial, Mr. Jenkins, a witness for the People would testify against him and he would get the chair;

"In February, 1955, he was brought into court, represented by counsel, and informed that the District Attorney was willing to accept a plea to second degree murder and that his sentence would be twenty years to life; he thereupon pleaded guilty to that charge;

"March 14, 1955, judgment of conviction was entered, including a sentence of forty-five years to life";

Among other allegations by Ross was the following:

"13. Sometime later he visited me again; I would say it was five or six weeks afterward, but I cannot be certain with greater specificity. I asked him then 'to get my confession back.' I recall those to have been my exact words. I meant that I wanted to repudiate the confession and have it suppressed. I

(*footnote continued on following page*)

these allegations raise a sufficient question as to the voluntariness of the plea of guilty to require a hearing before the issue is determined.

On the record before us, it appears that Ross has sufficiently raised his present claims in the state courts to satisfy the requirement of exhaustion of state remedies. On oral argument, however, it was represented that a second petition by Ross for relief by writ of error *coram nobis* has been brought to and is pending in the state courts.

(*footnote continued from previous page*)

spoke in the belief that it could be done in some way. He told me that that was completely out of the question and that at any rate the District Attorney had the gun, that nothing had changed, that Jenkins would tell his story to the jury, and that his testimony, backed up by the confession and the gun, would be enough to make 'a jury of twelve cousins' convict me and send me to the electric chair. He told me that he would 'get the first possible break' for me from the District Attorney, but that I 'would be dead by the Fourth of July' if I risked a trial.

"14. When I was brought to Court in February of 1955, Mr. Strelzin came in to see me while I was in the detention cell. I asked him again about repudiating and suppressing my confession; this seemed to exasperate him because he spoke sharply about having gone all through that before and that I had better listen to him because *he* was my lawyer and not those convicts in Raymond Street who would all be in Sing Sing in six months with all the law they knew. I told him I had not asked him on the basis of anything anyone had told me. He seemed to grow calmer at that. He told me he had spoken to the District Attorney, who was willing to allow me to plead to second degree murder, and I would get twenty years to life; he said it was an 'or else' offer, that I knew the evidence the District Attorney could present against me. He said that things were no better than before and, if anything, were much worse; the District Attorney had the confession, the gun, and Jenkins, who could be expected to tell any story to help himself. If I insisted on going to trial, well, he was my lawyer and would do what he could, though that couldn't amount to very much because 'there isn't a pair in the world to beat four aces.' Twenty to life was a long time, he wasn't going to argue that it wasn't; but it had to be better than the electric chair."

If this is determined by the District Court to be the fact, that court may defer hearing in this matter pending final determination of the action in the state courts. And, if hearing is had on the issue in the state courts, the District Court may find further hearing before it unnecessary to its determination of the merits. We reverse and remand to the District Court for further proceedings not inconsistent with this opinion.

This case raises the narrow question whether a District Court should apply the standards of *Townsend* v. *Sain*, 372 U. S. 293 (1963), in determining whether to hold an evidentiary hearing upon a habeas corpus petition where the petitioner is confined after a plea of guilty and is contending that the plea was not voluntary, because it was induced by the existence, or threatened use, of an allegedly coerced confession.

It is clear, first of all, that a plea of guilty, even where the defendant is represented by counsel, is not an absolute bar to collateral attack upon a conviction. *Waley* v. *Johnston, Warden*, 316 U. S. 101 (1942). Cf. *Pennsylvania ex rel. Herman* v. *Claudy, Warden*, 350 U. S. 116 (1956). (In *Herman*, petitioner did not have benefit of counsel.) See also *Machibroda* v. *United States*, 368 U. S. 487, 493 (1962): "A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack." To paraphrase *Harrison* v. *United States*, 392 U. S. 219, 223 (1968), "The question is not *whether* the petitioner made a knowing decision to [plead] but *why*." Nor is the mere existence of a coerced confession enough to invalidate a later guilty plea by a defendant represented by counsel.

The question to be answered in any case involving a collateral attack on a conviction based upon a plea of guilty

is usually expressed in terms of whether or not the plea was a "voluntary" act. [An "involuntary" plea of guilty is inconsistent with due process of law, see *Waley* v. *Johnston, supra,* 316 U. S. at 104, and thus invalid whether made in federal or state court.] And *Townsend* v. *Sain, supra,* 372 U. S. at 312-13, requires that where the petitioner in such a case has not received a "full and fair evidentiary hearing" in a state court as to the voluntariness of the plea, a hearing be held in the federal District Court.

The question of when to hold a hearing has apparently been complicated in this Circuit, however, by confusion between the doctrine that an involuntary guilty plea may be collaterally attacked and the well-established doctrine that *if* the plea *is* voluntary, it is an absolute waiver of all non-jurisdictional defects in any prior stage of the proceedings against the defendant.

Judge Weinfeld said in *United States* v. *Colson,* 230 F. Supp. 953, 955 (S.D.N.Y. 1964), "The determination of the ultimate question of whether the defendant, at the time he pled guilty, had the free will essential to a reasoned choice, rests upon probabilities and, of course, cannot be resolved with mathematical certainty. It involves an evaluation of psychological and other factors that may reasonably be calculated to influence the human mind . . . [I]t is necessary to consider the plea of guilty against the totality of events and circumstances which preceded its entry." The determination is difficult, but it is not necessarily rendered more difficult simply because a coerced confession or an illegal search and seizure is one of the factors which may be taken into account.

In the case at bar, the court, relying on *Glenn,* found it unnecessary to make such a determination. This, we think, resulted from a too expansive reading of *Glenn.* The opin-

ion in *Glenn* may be read either of two ways: (1) the allegation of a coerced confession, *without more*, is not sufficient to raise the issue of the voluntariness of a guilty plea; or (2) an unconstitutionally coerced confession is never relevant to the issue of the voluntariness of a guilty plea. The first, more narrow reading, seems to us to state the proper rule. But the second reading (the much more likely meaning of the opinion despite the use of the word "voluntary," in view of the allegation that the plea was *coerced by the existence of* an involuntary confession) confuses the doctrine that an involuntary guilty plea may be collaterally attacked with the doctrine that if it is voluntary, a guilty plea waives prior defects in the proceedings against the defendant.

The court relied on two cases in *Glenn: United States ex rel. Swanson* v. *Reincke,* 344 F. 2d 260 (2 Cir. 1965), cert. denied 382 U. S. 869, and *United States ex rel. Boucher* v. *Reincke,* 341 F. 2d 977 (2 Cir. 1965). Neither of those cases holds that the waiver rule should operate to make an invasion of the defendant's Constitutional rights irrelevant to the issue of the voluntariness of the guilty plea.

In *Swanson,* this court affirmed the denial of relief in a habeas corpus proceeding challenging the constitutionality of the statute under which petitioner had been convicted, where a hearing had been held below. There is language in the court's opinion refusing to rest affirmance on the ground that a plea of guilty should bar collateral attack. In discussion of that issue, 344 F. 2d at 261-62, it was said:

> The cases most nearly in point but by no means exactly so concern guilty pleas proper in other respects, such as right to counsel, but lodged after the police had obtained evidence in violation of constitutional rights; a number of circuits have said such

> guilty pleas are not subject to attack [citing cases], even when induced by that evidence [citing cases].[2]

In *Boucher*, the other case cited in *Glenn*, the petitioner sought to attack his conviction based upon a guilty plea. After stating the waiver rule, this court said:

> To circumvent the effect of the guilty plea as a waiver, the petitioner asserts that his plea was induced by inadequate representation by counsel and by the fear that unconstitutionally obtained evidence would be used at his trial.

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[2] The cases cited in the quoted discussion in *Swanson* are the following: *Gonzalez* v. *United States*, 210 F. 2d 825 (1 Cir. 1954) (denial of motion to vacate judgment affirmed where conviction based on guilty plea and motion based *solely* on the ground that evidence had been unconstitutionally seized); *Hall* v. *United States*, 259 F. 2d 430 (8 Cir. 1958), cert. denied 359 U. S. 947 (1959) (denial of motion to vacate sentence affirmed where the allegation was of confession after "four hours of intensive interrogation without legal advice or counsel," but there was a *finding in the District Court* that there was a "free and voluntary" plea of guilty); *Watts* v. *United States*, 278 F. 2d 247 (D. C. Cir. 1960) (denial of Sec. 2255 motion to vacate sentence affirmed, where the motion was based on the ground that police used appellant's co-defendant's confession to induce him to confess and then to plead guilty, but *upon a full hearing in the District Court it was found*, on ample evidence, that the guilty plea was "competently, voluntarily, and intelligently entered"—the statement, picked up out of context in the West's headnote, that collateral attack on the plea of guilty would not lie, reads in full, 278 F. 2d at 250: "Finally, at the hearing we ordered, appellant frankly admitted his guilt. On this record collateral attack would not lie."); and *United States ex rel. Staples* v. *Pate*, 332 F. 2d 531 (7 Cir. 1964) (dismissal of petition for habeas corpus affirmed, where petitioner contended that his plea of guilty did not waive prior police misconduct—alleged illegal search—which "induced" his plea, but the *District Court found after a hearing* that petitioner was not entitled to a writ, and the Court of Appeals noted three times that there was no evidence presented at the hearing that the plea was not voluntary).

341 F. 2d at 981. The opinion then goes on to explain how the petitioner's representation by counsel had been entirely competent, there were no circumstances indicating an illegal search and seizure, and "There is not a shred of evidence that anyone induced him to plead guilty and the court concluded 'it was made freely, voluntarily and intelligently.'" A hearing was held in *Boucher*.

The meaning of the rule was also left somewhat uncertain by a *per curiam* opinion in *United States ex rel. Martin* v. *Fay*, 352 F. 2d 418 (2 Cir. 1965), cert. denied 384 U. S. 957 (1966). There, a denial without a hearing of an application for habeas corpus was affirmed, where appellant claimed, *inter alia*, that he pleaded guilty because a coerced confession had been obtained from him. The court said: "An examination of the facts and circumstances surrounding the taking of the plea convinces us that the plea was made voluntarily, the colloquy between the sentencing judge and appellant being decisive." The court then cited the waiver rule, as stated in *Glenn*, along with a "see also" citation to *Swanson* and *Boucher*. Judge Waterman concurred on the ground of failure to exhaust state remedies, and stated that he thought the court had made an ambiguous use of the word "voluntary," since although the petitioner had not demonstrated that a hearing would prove his allegation that his guilty plea was "required by an alleged prior forced confession," "Nevertheless, I can conceive of situations in which a plea of guilty upon the advice of counsel would have been caused by circumstances entitling the defendant to challenge his own act on the ground it was a compelled act." 352 F. 2d at 419.

We have in other cases also used language inconsistent with the District Court's reading of *Glenn* here. In *United States ex rel. Siebold* v. *Reincke*, 362 F. 2d 592 (2 Cir. 1966), a denial of a petition for a writ of habeas corpus

was affirmed *per curiam* on the ground that "the hearing before the District Court indicated that petitioner's guilty plea was not the result of unconstitutionally obtained evidence." 362 F. 2d at 593. In the course of the opinion, it was noted that "A conviction will not be sustained if it rests upon a plea of guilty which is the result of coercion, nor, perhaps, if the plea of guilty resulted from other violations of constitutional rights," citing *Vaughn, supra,* and *United States ex rel. McGrath* v. *LaVallee,* 319 F. 2d 308, 311 (2 Cir. 1963). Neither *Glenn* nor *Martin* was mentioned. In *McGrath,* the court split three ways (for no hearing, a hearing, and outright granting of a writ of habeas corpus) in a case where petitioner contended that his guilty plea had been involuntary—the claim of coercion was based upon what the trial judge said to the petitioner just before the guilty plea was entered.

The rule should be stated as follows: Where a petition for habeas corpus raises a claim that a guilty plea was not voluntary, the standards of *Townsend* v. *Sain* are applicable in determining whether to hold a hearing; and although the waiver rule means that an allegation that the petitioner's constitutional rights were violated before the plea was taken is not, standing alone, sufficient to call the validity of the plea into question, nonetheless if it is alleged that the plea was coerced in a manner spelled out in the petition, the alleged violations are not irrelevant to the issue of the voluntariness of the plea. An alleged violation of constitutional rights is simply another factor to be taken into account in determining the voluntariness of the plea.

On the other hand, the fact that the petitioner was represented by counsel and acted after consultation with counsel is also to be given substantial weight in determining the issue of voluntariness of plea.

From and after *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), the state and federal courts have stressed the value and necessity of providing an accused with counsel because,

except in the very few cases of inadequate representation, the professional skill and judgment of the attorney, exercised on his client's behalf, affords the accused protection of his rights. The role of the attorney in advising a plea of guilty should not, therefore, be ignored. Even where there is evidence that a confession has been coerced, there may be factors which would justify counsel for the accused, once a fair hearing by the state court has been held on a motion to suppress the confession and suppression has been denied, to advise a plea of guilty. Therefore, a mere conclusory allegation by a prisoner without more, that the existence of a coerced confession induced his guilty plea, in the absence of any particularized allegations as to how that confession rendered his plea involuntary, should not ordinarily be considered sufficient to predicate an order for a hearing.[3] See *United States ex rel. White* v. *Fay*, 349 F. 2d 413 (2 Cir. 1965); *United States ex rel. Homchak* v. *New York*, 323 F. 2d 449 (2 Cir. 1963), cert. denied 376 U. S. 919 (1964).

The rule we have set out is apparently consistent with the views of at least the Third, Fifth, Sixth, Seventh, and Ninth Circuits. See *United States ex rel. Collins* v. *Maroney*, 382 F. 2d 547 (3 Cir. 1967) (*per curiam*); *Smith* v. *Wainwright*, 373 F. 2d 506 (5 Cir. 1967); cf. *Carpenter* v. *Wainwright*, 372 F. 2d 940 (5 Cir. 1967), a stronger case for the petitioner; *Reed* v. *Henderson*, 385 F. 2d 995 (6 Cir. 1967), dictum: "Appellant apparently attempts to circumvent the waiver attending the plea of guilty by claim-

[3] To enable the district court to decide whether or not a hearing should be ordered, additional supporting material such as the affidavit of the attorney who represented the petitioner when he entered the guilty plea, or exhibits or affidavits of persons having knowledge of the claimed facts, should be appended, with the petitioner's own affidavit, to the original petition filed with the district court. In this case, however, we are satisfied from the petitioner's affidavit alone that he is entitled to the requested hearing.

ing that the plea was involuntary in that it was the product of, or induced by, certain coerced admissions which had been obtained from him by the police. That this may be a ground for habeas corpus relief appears to be well settled," 385 F. 2d at 996; *Shelton* v. *United States*, 292 F. 2d 346 (7 Cir. 1961), cert. denied 369 U. S. 877 (1962); *Doran* v. *Wilson*, 369 F. 2d 505 (9 Cir. 1966).

To sum up: *Glenn* says, in effect, that a "voluntary" plea of guilty wipes out all prior invasions of the defendant's constitutional rights. Whether that is correct or not depends on the meaning of "voluntary"; it must be recognized that a prior invasion of the defendant's rights, even if not sufficient after the taking of the plea to overturn the conviction, may still be entirely relevant to the issue of the plea's voluntariness. The problem is that *Glenn*, together with *Martin*, is sometimes being read by the District Courts to say that a coerced confession or other violation of a defendant's rights is *never* relevant to the issue of voluntariness, and in these cases the District Courts are relying upon representation by counsel and proper questioning by the judge at the plea taking to establish voluntariness without more, even where the allegations of the habeas corpus petition raise questions which cannot be answered by reference to the transcript alone.

This court has recently discussed the reasons why the voluntary guilty plea constitutes a waiver of all non-jurisdictional defects, *United States ex rel. Rogers* v. *Warden of Attica State Prison*, *supra*, 381 F. 2d 209 at 213 (2 Cir. 1967):

> There is nothing inherent in the nature of a plea of guilty which *ipso facto* renders it a waiver of a defendant's constitutional claims. Rather, waiver is presumed because ordinarily such a plea is an indication by the defendant that he has deliberately failed or refused to raise his claims by available state pro-

cedures; therefore, principles of comity and the interests of orderly federal-state relations require that he should not be allowed to present these claims to the federal courts.

A distinguishing feature of the present case, however, is that the only available state procedure by which he could contest the validity of the confession was the one declared retroactively unconstitutional in *Jackson* v. *Denno*, 378 U. S. 368 (1964). This is even more damaging to an accused than the lack of a right to appeal the intermediate order denying the Fourth Amendment motion to suppress in *Rogers, supra*, p. 214.

Faced with that hazard as his only alternative recourse, made particularly perilous in the context of the first degree murder charge with a possible death penalty, the decision of the accused, on advice of counsel, to plead guilty to second degree murder might well be held to have been involuntary. The petitioner cannot be deemed to have waived his coerced confession claim by deliberately bypassing state procedures when the state failed to afford a constitutionally acceptable means of presenting that claim, and he cannot be deemed to have entered a voluntary plea of guilty if the plea was substantially motivated by a coerced confession the validity of which he was unable, for all practical purposes, to contest.

The judgment is reversed and the case remanded with instructions to hear and determine petitioner's application unless a hearing is held by the courts of the state determining under the standards set forth herein the issue of the voluntariness of petitioner's plea[4] within 60 days from the

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[4] The conviction would stand, of course, if the state court found after full and fair evidentiary hearing, either that the confession was voluntary or that the plea was not substantially motivated by the confession.

date of issuance of the mandate herein, or such further time as the District Court may for good cause allow.

Turning to *United States ex rel. Dash* v. *Follette*, Foster Dash was sentenced on August 3, 1959, in the New York state courts on plea of guilty to a charge of robbery second degree, to imprisonment for a term of 8 to 12 years as a second felony offender. Dash sought release by writ of error *coram nobis* on the ground that a false confession was obtained from him after indictment in violation of his right to counsel, and that his plea of guilty was induced by advice of counsel that the confession would negate any chance of acquittal and by a threat by the trial judge that he would receive the maximum possible sentence if he went to trial and was found guilty. The writs were denied without hearing, and the orders affirmed by the Appellate Division (21 A. D. 978) and by the Court of Appeals (16 N. Y. 2d 493, 260 N. Y. S. 2d 437 (1965)), two justices dissenting.

Petitioner then applied for writ of habeas corpus, alleging similar grounds, in the United States District Court for the Southern District of New York. The Court, John M. Cannella, *J.*, denied the application, relying principally on *United States ex rel. Glenn* v. *McMann*, *supra*, *United States ex rel. Swanson* v. *Reincke*, *supra*, and *United States ex rel. Boucher* v. *Reincke*, *supra*,[5] and petitioner appeals. We reverse and remand with instructions.

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[5] The District Court summarized the record before it as follows:

"Petitioner alleges: (1) that his plea of guilty was the product of a coerced confession, (2) that his plea of guilty was coerced by the trial court by telling him he would get the maximum penalty if found guilty after trial.

"In regard to the first contention, it is well settled that a voluntary plea of guilty entered on advice of counsel constitutes a waiver of all nonjurisdictional defects in any prior stage of

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Appendix B

In this case, as in *United States ex rel. Ross* v. *McMann*, decided herewith, a state prisoner's application for writ of habeas corpus was denied without hearing, the court relying largely on *United States ex rel. Glenn* v. *McMann*, since the petitioner, represented by counsel, had pleaded guilty in the state court. Here Dash alleges coercion of his confession. (Conviction of two of his co-defendants who went to trial was set aside because it was held that their confessions were coerced. *People* v. *Waterman*, 12 A. D. 2d 84, aff'd 9 N. Y. 2d 561 (1961).) He also alleges coercion of his plea, relying partly on the existence and threatened use of his coerced confession, and partly on an alleged threat by the judge to impose the maximum possible sentence if he were found guilty after a trial. The latter ground was dismissed from consideration by the judge because the report of the state court proceeding, *People* v. *Dash*, 16 N. Y. 2d 493 (1965), indicated that the prosecutor had filed an affidavit categorically denying that the trial judge ever threatened the defendant.

In this case, as in *Ross* v. *McMann*, the claim is made that the existence of a coerced confession, in a case determined prior to *Jackson* v. *Denno*, *supra*, so tainted the

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the proceedings against the defendant. *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018 (2d Cir. 1965); *United States ex rel. Swanson* v. *Reincke*, 344 F. 2d 260 (2d Cir. 1965); *United States ex rel. Boucher* v. *Reincke*, 341 F. 2d 977 (2d Cir. 1965). Petitioner therefore cannot succeed on the basis of his first contention.

"With respect to the second contention it appears that the prosecutor in the state court proceedings filed an affidavit in which he categorically stated that the trial judge never threatened the defendant. See, *People* v. *Dash*, 16 N. Y. 2d 493 (1965).

"Further the transcript relating to the entry of petitioner's plea of guilty clearly indicates that the defendant made an intelligent and uncoerced choice and that no promises or threats were made to him."

state court proceedings that the plea was not voluntary. For the reasons set forth in *Ross* v. *McMann*, we think the allegations here sufficient to call for a hearing on the voluntariness of the plea unless a full hearing and determination of the issue is provided in the courts of the state. As we held in *Ross*, "The petitioner cannot be deemed to have waived his coerced confession claim by deliberately by-passing state procedures when the state failed to afford a constitutionally acceptable means of presenting that claim, and he cannot be deemed to have entered a voluntary plea of guilty if the plea was substantially motivated by a coerced confession the validity of which he was unable, for all practical purposes, to contest." In these circumstances there is an issue as to the motivation of the plea which cannot be resolved without a hearing. If it was motivated by the claimed threat of the judge, or the existence and threatened use of a coerced confession, it may be found not to have been voluntary. On the other hand, if it is found that there was no such threat by the judge, and if the plea was freely made on advice of counsel because of the weight of the state's case aside from the confession, with apparent likelihood of conviction regardless of the confession, in a considered effort to obtain a lighter sentence, the court may find the plea voluntary, and the conviction unassailable.

Reversed and remanded with instructions to hear and determine petitioner's application unless a hearing is held by the courts of the state determining under the standards set forth herein the issue of the voluntariness of petitioner's plea[6] within 60 days from the date of issuance of the

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[6] The conviction would stand, of course, if the state court found after full and fair evidentiary hearing, either that the confession was voluntary and there was no threat by the judge, or that the plea was not substantially motivated by the confession or by the alleged threat of the judge.

mandate herein, or such further time as the District Court may for good cause allow.

WATERMAN, *Circuit Judge,* concurring:

I concur in the opinion for the majority of the *in banc* Court written by Judge Smith.

I accept Judge Kaufman's approach in his concurring opinion, and I concur in that opinion, also.

SRW

KAUFMAN, *Circuit Judge,* concurring (with whom Judges Waterman, Anderson and Feinberg concur):

I am in full accord with my brother Smith's opinion.

Because we are not writing on a clean slate, and the majority accordingly came to the only conclusion open to it in *Ross* and *Dash,* I feel impelled to respond to the objections raised by my dissenting brothers.

Notwithstanding the caustic tones in which one of them has retorted I believe it my responsibility to set forth my views lest one believe that only the dissenters seek to protect us "against those who have made it impossible to live today in society" *Harrison* v. *United States,* 392 U. S. 219, 235 (1968) and that the majority has become an ally of criminals, devoid of all interest in the community's safety and living insensitively in its ivory tower.

First, I should hardly have thought it necessary, but for my brothers' dissent, even to mention the judicial precept that the ultimate guilt or innocence of the defendants has no bearing on the issues before us. Under our system of criminal justice two indispensable conditions must be met to render valid a determination of guilt: not only must the accused actually be guilty of the crime for which he was convicted, but the procedure leading to his conviction

must comport with the requirements of due process. Thus, even if we were to agree with my dissenting brother's declamation that "Men who first confess and then, on the advice of counsel, plead guilty to serious crimes, do so because they are," I submit that such an observation is gratuitous and irrelevant to the issue before us: whether the state procedures leading to the entry of the pleas of guilty in question were fundamentally fair in a constitutional sense.

Second, I am impelled to dissipate the impression that our decision is somehow a novel departure from established constitutional tenets. On the contrary our decisions here are absolutely required by the principles the Supreme Court has long enunciated. Thus, in *Machibroda* v. *United States,* 368 U. S. 487, 493 (1962), the Court cautioned:

> ". . . . A plea of guilty differs in purpose and effect from a mere admission or extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime courts should be careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." [quoting *Kercheval* v. *United States,* 274 U. S. 220, 223 (1927)].

This instruction of the Court cannot be ignored merely because the particular facts of that case are somewhat different from those in the cases before us, or because non-essential distinctions might be spun. If we could turn our backs on a pronouncement as clear as that quoted merely because the facts in the case under consideration may not be on all fours, no precept or *ratio decidendi* of the Su-

preme Court would have any force. It does not require too much imagination to recognize that the principles and the problems we are dealing with are the same. *Machibroda* mandated that, because of the extreme gravity of a guilty plea, in *all* cases where a conviction based upon such a plea is attacked we must *carefully* and conscientiously consider the surrounding circumstances to determine whether it was properly and voluntarily made. And since *Machibroda* itself involved a collateral attack on a conviction based upon a guilty plea we cannot, as one of my dissenting brothers suggests, ignore the applicability of this mandate to other cases where post conviction attacks are made on the propriety of the guilty pleas merely because they come "long after the defendant has gotten the benefit of his bargain."

Moreover, in *Herman* v. *Claudy*, 350 U. S. 116, 118 (1956), the Court further instructed:

> ". . . [A] conviction following trial *or on a plea of guilty* based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause." [Italics added.]

While the petitioner in *Herman* alleged a more aggravated deprivation of rights than appears in the cases before us, such a distinction is not compelling. Although the court was dealing with a greater degree of contamination, I do not read *Herman* as preaching a doctrine that the taint must reach only the gradations found there before one may claim the pleas were induced by fundamentally unfair procedures. If the Supreme Court had intended to limit the holding to the precise facts in that case it would have done so explicitly, or at least by intimation, a course it has followed in so many other cases where it desired to achieve such a limited goal. When instead the court enunciated a clear, unqualified, and unequivocal principle of general ap-

plicability, we, as an inferior court, are duty bound to regard it as governing in analogous cases presenting the same question of law. My brother Friendly made the point when he said in another context, "Our duty as an inferior federal court is to apply, as best we can, the standards the Supreme Court has decreed. . . ." *United States* v. *Motion Picture Film Entitled "I Am Curious–Yellow,"* Dkt. No. 32448 (2d Cir. decided November 26, 1968) (concurring opinion) at 3682 (holding the film not obscene), whether or not we would make the same pronouncements if free to do so.

Judges must be careful lest their personal predilections lead them to ignore the constitutional requirements set forth by the Supreme Court, by indulging in sophistic games of distinction-making because they do not approve of the Court's Constitutional determinations. In this instance we are buttressed in our interpretation of *Herman,* which one of my dissenting brothers pansophically dismisses as "a dismal failure," by the knowledge that many other federal circuit courts have also "failed" and read *Herman* precisely as we have. E.g., *Reed* v. *Henderson,* 385 F. 2d 995, 996 (6th Cir. 1967); *Smiley* v. *Wilson,* 378 F. 2d 144, 148 (9th Cir. 1967); *Bell* v. *Alabama,* 367 F. 2d 243, 246 (5th Cir. 1966), cert. denied 386 U. S. 916; *Jones* v. *Cunningham,* 297 F. 2d 851, 855 (4th Cir. 1962), cert. denied 375 U. S. 832 (1963). Indeed, in *United States ex rel. Vaughn* v. *LaVallee,* 318 F. 2d 499 (2d Cir. 1963), apparently overlooked, my able brother Lumbard endorsed *Herman* when, citing that case he remarked "A plea of guilty which is prompted by fear that unconstitutionally obtained evidence will be used at trial will not sustain a conviction." 318 F. 2d at 499.

Not only is the result of the majority following the only course left open to a lower court by the Supreme Court, but it is sound because, as the law must, it comports with

the realities of the situation. Consider for a moment the paradigm, where the prosecution has no other evidence against the defendant but the confession which it illegally obtained from him, and where, as in *Ross* and *Dash*, the defendant has no adequate means of challenging the confession prior to his trial. Under these circumstances it would be nothing less than fantasy for us to say that the existence of the confession could not have substantially motivated the plea. And if, in the more common case, the determination is more difficult because the prosecution also has other evidence against the defendant, I do not believe that such difficulty releases us from the obligation to consider the possibility that the existence of the confession had a substantial motivational effect. In reality we can never, as my brothers urge, escape deciding these cases, as distasteful as it might be. By refusing to consider them individually we merely decide they should all come out the same way—an approach hardly commendable or likely to reach a just result in those cases worthy of consideration.

Moreover, once we face up to the realities of the situation, the fundamental fallacy of my dissenting brothers' argument—that no coercion or untoward pressure of the *state* caused these pleas—becomes apparent. The state allegedly illegally obtained the confession from the defendant and the state denied him any adequate means of suppressing it prior to trial. How the state can then be transformed into a disassociated neutral observer when defendant pleads guilty because of that confession is too metaphysical for my comprehension. Once it has thus unfairly placed the defendant in an inherently coercive situation, I do not understand our solicitude for the state's claim that all pleas of guilty must under any and all circumstances be final, absolute and beyond judicial instruction.

Moreover, I must emphasize that, as the majority indicates in *Ross* we are by no means the first or only circuit to reach this result. Particularly in the Fourth Circuit, e.g., *White* v. *Papersack,* 352 F. 2d 470, 472 (1965); *Jones* v. *Cunningham, supra;* the Fifth Circuit, e.g., *Bell* v. *Alabama, supra;* and the Ninth Circuit, e.g., *Smiley* v. *Wilson, supra; Doran* v. *Wilson,* 369 F. 2d 505 (1966), the rule my dissenting brothers view as so novel and indeed unprecedented—that a guilty plea induced by the existence of an illegally obtained confession cannot stand —is well established law. And, we long ago embarked on the trying course of reviewing state convictions because the Supreme Court so decreed. See e.g., *U. S. ex rel. Caminito* v. *Murphy,* 222 F. 2d 698 (1955), cert. denied, 350 U. S. 896; *U. S. ex rel. Wade* v. *Jackson,* 256 F. 2d 7 (1958), cert. denied, 357 U. S. 908; *U. S. ex rel. Corbo* v. *LaVallee,* 270 F. 2d 513 (1959), cert. denied, 361 U. S. 950 (1960); where we found confessions coerced, despite jury findings to the contrary which had been accepted by New York Courts.

Finally, it would, in my view, be the rankest unfairness, and indeed a denigration of the rule of law, to recognize the infirmity of the pre-*Jackson* v. *Denno* procedure for challenging the legality of a confession in the case of prisoners who went to trial but to deny access to the judicial process to those who improperly pleaded guilty merely because the state would have more difficulty in affording a new trial to them. Nor do I believe that we are free to refuse to consider a valid claim for a hearing because the separation of meritorious claims from those of no merit is difficult. This "difficult" task is faced daily by judges; to avoid it by throwing out all petitions—even meritorious ones—because the chore is onerous would be an abdication of our judicial duty. The Supreme Court clearly stated in *Townsend* v. *Sain,* 372 U. S. 293 (1963) that where a state

prisoner alleges facts which, if proved, would entitle him to relief, he must be afforded a federal hearing on his habeas petition, where he has not received an adequate state hearing on the issue. And the Court has also held, repeatedly and emphatically, that where petitioner's allegations present an issue of fact not refuted by the files and records, we cannot deny him a hearing merely because his allegations are improbable. *Machibroda* v. *United States,* 368 U. S. 487, 494 (1962); *Waley* v. *Johnson,* 316 U. S. 102, 104 (1942); *Walker* v. *Johnson,* 312 U. S. 275, 285 (1941).

Although our decisions may encourage some prisoners to file petitions wholly devoid of merit, the short answer to this is that most advances in the law have been subject to abuse. But, if this were to deter courts from doing what should be done, the law would remain stagnant. Nor, do I share the belief that the mere filing of such petitions will overwhelm our experienced district judges. The trained judges' eyes can quickly sift out those not deserving of a hearing. It was not much of a task for the district judge and this Court to do just that with Rosen's petition. Indeed, the statistics of the Administrative Office of the Unied States Courts reflect that hearings in state habeas corpus cases between 1966 and 1968 have been granted in only about 8% of the approximately 5000 to 6000 applications filed each year during that period.[1] Moreover, we must not overlook the fact that pleas in the post-*Jackson* v. *Denno* era will not be affected by our ruling.

In any event, we have already recognized:

> "There is an understandable tendency to try to avoid hearings . . . where it appears that there is little merit

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[1] Administrative Office of the United States Courts, Annual Report of the Director, 1966 and 1967, Tables C-3 and C-4. The information for 1968 is not yet published.

in the petition, and that hearing might well be of no avail to the petitioner. With the crowded dockets and delay caused by a heavy judicial workload, a diligent judge, out of concern for our goal of speedy justice, may well overlook the fact that a particular application alleges sufficient particulars to require a hearing. Our concern for efficiency must not outweigh our concern for individual rights. We cannot refuse a hearing because hearings generally show that there is no real basis for relief, or even because it is improbable that a prisoner can prove his claims." *United States* v. *Tribote*, 297 F. 2d 598, 603-04 (2d Cir. 1961).

A court of law whose function it is to guard against injustice cannot refuse access to those properly invoking its process merely because it must also deal with others who cry wolf too often.

Accordingly, I believe that when, as in *Ross* and *Dash*, a petitioner alleges facts sufficient to support his claim that his guilty plea was substantially induced by the existence of a confession illegally obtained from him which he had no adequate means of challenging, and his allegations are not controverted by the record, we cannot avoid our duty—time consuming as it may be—to grant him a hearing. Of course, we are not suggesting for a moment that the writ should be sustained after such hearing. The petitioner must carry the burden of establishing that the coerced confession substantially motivated him in pleading guilty. Thus, we are a long way from the house of horrors which the dissenting opinions suggest would confront us if a reprosecution were ordered. We do no more today than to determine that *all* petitions cannot be thrown out without regard to their merits merely because "no certain answers" can be given with the precision of a mathematical equation—a condition which the dissenters would seem to require. If this test had validity no court would ever inquire into the volun-

tariness of a plea of guilty or the voluntariness of a confession, for voluntariness is a purely subjective action and never can "certain answers" be given by the fact finder. One of my dissenting brothers recognizes that "Absent some credible and detached *proof* to the contrary, we must assume that defendant's interests have been protected, and that pleas of guilty would not have been offered without substantial basis for believing [they] were guilty . . ." (Emphasis added.) Ross and Dash merely ask for the chance to give this *proof* at a hearing, which I cannot find any sound basis for denying in light of the allegations in their petitions.

ANDERSON, *Circuit Judge* (concurring):

I concur in the opinions of Judge Smith and Judge Kaufman.

FEINBERG, *Circuit Judge* (concurring):

I concur in the opinions of Judge Smith and Judge Kaufman.

LUMBARD, *Chief Judge*, dissenting (with whom Judges Moore and Friendly concur):

I would affirm the denials by the district courts of the petitions of these two state prisoners, Wilbert Ross and Foster Dash, for writs of habeas corpus.

In my opinion, these cases are governed by *United States ex rel. Glenn* v. *McMann*, 344 F. 2d 1018 (2d Cir. 1965), which held that "a voluntary guilty plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings." The conclusion that the guilty pleas in both of these cases were entered knowingly and without coercion is, to my mind, inescapable.

Appendix B

In each of these cases the state prisoner was represented by counsel long prior to the plea of guilty and there was adequate time for full consideration of the case by the defendant and his counsel. Furthermore, it is apparent that the pleas were motivated by knowledge that the state had substantial evidence in addition to any confession it may have had from the defendants. In sum, it is altogether clear that the defendants, after consulting with counsel, made an informed, deliberate and voluntary choice that their interests would be best served by pleading guilty to a lesser degree of the crime charged and by the likelihood that the sentence the judge would impose would be less than if they were to stand trial and be convicted.

Nor do I think that *Jackson* v. *Denno,* 378 U. S. 368 (1964), should be applied to require a hearing in plea of guilty cases to determine whether the existence of the allegedly involuntary confession "coerced" the plea of guilty or whether the plea was taken for other reasons. I would confine *Jackson* v. *Denno* to cases where New York used the confession at trial, over objection that it was coerced, at a time when New York failed to provide a means of testing such objection prior to trial; it should not be given retroactive effect to cases where defendants pleaded guilty.

To say that a hearing might show these pleas to have been "involuntary" because they were induced by the fact that New York law, at the time of the pleas, provided that the voluntariness of confessions which the petitioners claim they made would be tested by the jury, is to indulge in profitless speculation and to embark upon an inquiry where no certain answers are possible. Even the holding of hearings in such cases will impose upon New York's judicial system, and in corresponding degree on the Federal system, a substantial burden and needlessly consume the time of assigned counsel, law enforcement officers, prosecutors, those judges who accepted the pleas and those judges who must now take time to hold the hearings.

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For many years these cases had been concluded and forgotten. How can it be supposed more than 13 years after Ross' plea of guilty to second degree murder that there can be any reliable reconstruction of what the prosecution and defense knew about the nature and weight of the evidence available in 1955, or about the facts relevant to the "confession" and the state of mind of Ross at the time he pleaded guilty? While Ross has had time in prison to store up memories and imagine what happened in May 1954, when the murder occurred, and in 1955, when he pleaded guilty, the state's files of the case have been stored away and must be found if they can be. The prosecutor will have little, if any, memory of the case apart from what the file may disclose, and Ross' counsel, if he be available, may no longer have any files or any memory about the matter whatsoever.

Slim as are the chances of any reliable reconstruction of the situation as it bears on the 1955 plea, even slimmer are the chances of again prosecuting the case should the judgment of conviction based upon the plea of guilty be set aside. The witnesses available in 1955 may no longer be available; and even if they are available they could hardly be expected to have any trustworthy memory of events in May 1954. Almost certainly, since there was no trial of the action,[1] none of the witnesses gave testimony in such form that it could be used now in the event that they cannot be located.

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[1] In this respect the state is usually at a serious disadvantage where pleas of guilty are nullified and the case must be tried years later. Where there has been a trial and a retrial is required, the state may use the evidence of a witness who has become unavailable. New York Code of Criminal Procedure § 8(3)(d). Where a defendant has pleaded guilty, however, it would be a very rare case where the witness would have testified under oath subject to cross-examination under such circumstances that the evidence could be used if the witness were later unavailable.

Of course, the petitioners will testify concerning their claims in the light of their present state of mind with their imaginations prodded and guided by recent court decisions, including the majority opinion here, which point out the facts which will support a petition.

Settling cases on pleas of guilty is the means whereby the state and the defendants concerned dispose of about 80% of all charges of serious crime and about 95% of all convictions of such crimes. Of course in all such cases defendants are represented by counsel and, almost without exception, this had been the practice in the State of New York for many years prior to *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). It is a system which is advantageous to all the parties concerned; it saves an enormous amount of time for law enforcement officers and prosecutors; almost always it virtually guarantees the defendant a lesser penalty, usually on lesser and fewer charges,[2] it frequently makes possible the prosecution or disposition of charges against other persons; it enables the judges and courts to handle many times the volume of cases which could be processed were trial required in every case.

If a defendant's decision to plead guilty can be attacked and placed in jeopardy many years later, the state will have been deprived of a substantial part of the benefit which it properly and fairly thought it should enjoy—namely, achieving a sure and certain result and saving considerable time and expense. Once the court has accepted the plea and imposed sentence there is nothing which the state can do to reopen it. The charges which have been dismissed and disposed of are finally settled

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[2] The rationale for this has been articulated in the American Bar Association Standards for Pleas of Guilty, formulated by an Advisory Committee of which Walter V. Schaefer, Justice of the Supreme Court of Illinois, was Chairman and adopted by the ABA House of Delegates in February 1969.

forever. Absent any fraud or overreaching existing at the time of the plea, the same rule should apply with respect to the defendant's right to reopen the case. The people cannot benefit from any subsequent change in the law and the defendant should have no right to reopen the proceedings years later because some different procedure has been created by judicial decision.

The interest in finality is particularly important in this area because of the great percentage of convictions based upon pleas of guilty. As shown by the chart below, about 95% of all New York State indictments resulting in conviction are disposed of by pleas of guilty; in other words, for every conviction obtained after trial, 19 convictions are obtained by guilty pleas.

DISPOSITION OF INDICTMENTS IN NEW YORK STATE
(excluding youthful offender cases)[3]

Year ending June 30,	*Total dispositions*[4]	*Disposition by dismissal, discharge on own recognizance, and acquittal*	*Total convictions (after trial and by guilty plea)*	*Convictions by guilty plea*	*% of total dispositions based on guilty plea*	*% of total convictions based on guilty plea*
1963	18,711	3,288	15,423	14,655	95.0%	78.3%
1964	17,619	2,445	15,174	14,413	94.9%	81.8%
1965	16,421	2,188	14,233	13,501	94.8%	82.2%
1966	17,447	2,204	15,243	14,482	95.0%	83.0%
1967	18,029	2,701	15,328	14,461	94.3%	80.2%
Total 1963-1967	88,227	12,826	75,401	71,512	94.8%	81.0%

[3] From the annual reports of the Administrative Board of the Judicial Conference of the State of New York, for the years 1964

(*footnote continued on following page*)

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Were there any reason to suppose that injustice has resulted from the taking of pleas of guilty in New York courts in cases where prisoners, represented by counsel, had confessed, further inquiry would at least be justified. But no such suggestion has been made; no cases of injustice are cited and so far as I am advised there have been no such cases. For many years New York State has provided counsel in all cases where serious crime is charged and the defendant is unable to retain counsel. Absent some credible and detailed proof to the contrary, we must assume that defendants have been properly advised by their counsel, that their interests have been protected, and that pleas of guilty would not have been offered without substantial basis for believing that the defendants were guilty in facts and guilty in law.[5]

For these reasons I find no justification in questioning these pleas of guilty in the light of the claims the petition-

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(pp. 236-239), 1965 (pp. 193-195), 1966 (pp. 269-271), 1967 (pp. 243-246), 1968 (pp. 333-335).

[4] The figures were arrived at by adding the figures from the Criminal Terms of the Supreme Court of New York City and the Supreme and County Courts outside New York City. The figures include all indictments disposed of:

(1) by plea of guilty to felony before, during or after trial,
(2) by plea of guilty to misdemeanor reduced from felony before, during, or after trial,
(3) by dismissal of the indictment,
(4) by discharge on own recognizance,
(5) by direction of acquittal,
(6) by acquittal after trial,
(7) by conviction after trial.

[5] Of course the gross incompetence of counsel *or* other circumstances indicating substantial failure of representation would present a different question under the Sixth Amendment. No claim of that sort is even suggested in these cases.

ers have made here. Nor do I find anything in any decision of the Supreme Court which requires a Federal court to hold a hearing on such claims. In *Machibroda* v. *United States*, 368 U. S. 487 (1962), the claim was that the court had not made proper inquiry regarding the voluntary nature of the plea as required by Rule 11, Federal Rules of Criminal Procedure, and also that the plea was entered because of promises and threats of the prosecutor. The court there held that despite affidavit denials by the prosecutor, the issues of fact required a hearing. No such compelling allegations are made by Ross or Dash.

Nor does *Jackson* v. *Denno*, 378 U. S. 386 (1964), require the district court to consider the confession claims. *Jackson* held that a defendant who had gone to trial, before a jury which was left to determine whether the confession admitted in evidence was voluntary, had been denied due process of law, since it was impossible to determine how the jury treated the confession. Here, however, the unconstitutionality of the pre-*Jackson* procedure is relevant only for its supposed impact in deterring defendants from going to trial and thereby inducing their pleas of guilty. This impact, which would be virtually impossible to determinte since it requires reconstructing the defendant's state of mind, is unquestionably remote and speculative. It cannot be doubted that the existence of the pre-*Jackson* procedure has had a far more remote effect on the reliability of the process for determining guilt, cf. *Johnson* v. *New Jersey*, 384 U. S. 719, 729 (1966), in plea of guilty situations than it has had in cases which actually went to trial.

Nor is it accurate to say that going to trial and contesting the voluntariness of their confessions was a useless procedure for defendants who claimed that their confessions had been coerced. Since 1955 this court has carefully examined records in New York State criminal trials where

such claims were made, and in some cases we have found that the confessions were coerced, despite jury findings to the contrary which had been accepted by the New York courts. See, e.g., *U. S. ex rel. Caminito* v. *Murphy,* 222 F. 2d 698 (1955), cert. den. 350 U. S. 896; *U. S. ex rel. Wade* v. *Jackson,* 256 F. 2d 7 (1958), cert. den., 357 U. S. 908; *U. S. ex rel. Corbo* v. *LaVallee,* 270 F. 2d 513 (1959), cert. den., 361 U. S. 950 (1960).

For these reasons, and because of the far greater effect it would have upon the administration of justice if it were applied to plea of guilty case, I think it is clear that *Jackson* v. *Denno* should be applied retroactively only to cases which went to trial. Cf. *Stovall* v. *Denno,* 388 U. S. 293 (1967).

There is no authority to the contrary. In the only case where this court has required a hearing involving a plea of guilty in a state court, *U. S. ex rel. McGrath* v. *LaVallee,* 319 F. 2d 308 (1963), the claim was that the trial judge had coerced the plea; there was no claim of a coerced confession.[6]

While I would affirm the denial of the prisoners' petitions for the reasons stated above, I also believe that even on principles stated in Judge Smith's opinion, it is clear that there is an insufficient basis to require a hearing. Therefore I proceed to discuss the facts of the two cases.

Petition for Wilbert Ross

On February 4, 1955, when Ross pleaded guilty to murder in the second degree, he knew that one Robert

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[6] Following this 1963 opinion there was an extensive hearing in the district court at which the state judge testified. The district court judge held that there had been no coercion by the state court judge and we affirmed the district court's denial of the petition for habeas corpus. 348 F. 2d 373.

Jenkins (whom he does not deny knowing) had told the police that Ross had forced him to commit the murder by threatening Jenkins' life and the life of Jenkins' wife. Ross knew this because, by means of an inter-office device, he heard Jenkins tell this to the police. At this time Ross was in jail on a charge of attempted grand larceny. Ross claims that following threats of the detectives, and after his request to consult his lawyer had been refused, he gave a statement which he signed after it had been reduced to writing. He was later questioned by an Assistant District Attorney and he signed a statement which consisted of questions and answers which had been stenographically recorded. He was not advised about an attorney and he did not ask to consult an attorney.

Ross advised the police where they could find the murder weapon and they did find it. Ross does not claim to be innocent of the murder; it is abundantly clear that he is not.

Had Ross stood trial and had he testified he would have had to admit to a criminal record—by his own petition he had by then been convicted of attempted grand larceny (whether after trial or on plea he does not state) for which he had meanwhile been sentenced to a term of two to three years in state prison.

Ross was represented by Harvey Strelzin, Esq., whose competence he does not question, and Strelzin, who knew of Jenkins and the gun, advised a plea of guilty to murder in the second degree. Ross does not offer Strelzin's affidavit in support of his position, nor does he account for his failure to submit any affidavit or statement from Strelzin.

The majority holds that a petitioner must show that the plea was "substantially motivated by the coerced confession" before he is entitled to relief. As illustrated by *Rosen,* which we also decide today, a petitioner is also

required to make a substantial showing that the plea was in fact the result of the coerced confession and not of some other factor before he is entitled to a hearing. Whether the petitioner had made a sufficient showing in any particular case can only be determined by looking at the specific allegations. Where, as here, it appears that there was substantial other evidence against the petitioner, that his counsel recommended that he not pursue the confession claim, that he pleaded to a reduced charge, and that he did not raise the claim for ten years, the petitioner should be required to make more of a showing than the bare boned allegations he has made here before any court should be required to grant a hearing. In my view, petitioner's unsupported allegations suggest a conclusion that his counsel told him not to bother trying to "get back" his confession and going to trial, since he would, even without the confession (or the gun, for that matter), stand a good chance of being convicted of first degree murder and being sentenced to death. Ross accepted this as good advice and accepted the plea as a good bargain. Far from showing that the plea was substantially motivated by the confession, the allegation show that it was motivated both by the knowledge of guilt and the fear of being convicted for the crime he actually committed. In these circumstances, the plea should stand and no hearing to question it should be required.

Petition for Foster Dash

The petition of Foster Dash seeks a hearing on two different grounds: (1) that the plea was involuntary because there was not available to him at the time of his plea in 1959 a constitutional means of testing the voluntariness of his confession; and (2) that the trial judge coerced him into pleading guilty by threatening him that

he would get the maximum sentence if he stood trial and was convicted. As to the first ground, I would deny relief for the reasons I have set forth above.

But, even applying the standards set forth in Judge Smith's opinion, I do not believe a hearing should be granted as Dash gives no reason why he has not supported his petition with an affidavit or statement of his counsel. In fact there is nothing in the record to show who counsel was. The petition is wholly insufficient in failing to supply many material details of which the petitioner must have knowledge.

From Dash's sketchy petition, the answering affidavit of an Assistant Attorney General which is not controverted by Dash as to any stated facts, and from the decisions of the New York courts concerning Dash and his three co-defendants the following emerges:

On February 9, 1959, four persons, one of whom was armed, held up and robbed one Shedletsky in Bronx County. On February 24, 1959, the Grand Jury indicted Joseph E. Fields, "John Doe," "Richard Roe" and "Peter Doe" for the crime. Fields was the only one who had been apprehended soon after the crime and it was he who shortly thereafter named as his three confederates the petitioner, Foster Dash, Albert Devine and Rudolph Waterman.[7]

Dash was arrested on February 25 or 26. His petition alleges the police took him to a station house in New York County where he was beaten but said nothing and thereafter to a station house in the bronx. He requested to contact his family; or that he be permitted to have counsel, but he alleges these were denied him. He was further questioned and held incommunicado for 7½ hours

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[7] Apparently Waterman was not questioned until June, 1959, when he was in prison on another charge. The record does not show when Devine was arrested.

and then taken to the district attorney's office. He alleges threats made to him and the denial of his further requests. He says that he "then involuntarily signed a prefabricated confession to a crime that I did not commit."

Dash first mentions his "defense counsel" as being present on March 16, 1959 when he appeared for pleading and the district attorney "was only offering a plea to robbery in the first degree." He claims counsel advised him to plead guilty and throw himself on the mercy of the court because of the confession.

When the case came up again for pleading on April 1, 1959, Dash alleges the trial judge stated that if he went to trial and lost, the court would impose the maximum penalty and the judge said the crime with which he was charged was "next to murder."

Dash alleges that when the case was called again on April 6, he entered a plea of robbery in the second degree "due to the undue pressure which was placed upon this relator, as well as the alleged co-defendant." Later in his petition Dash states that "the threats made by the court was not a matter of open record." Fields also pleaded guilty that day. Later, on August 3, 1959, Dash was sentenced to a term of 8 to 12 years as a multiple offender. From Dash's petition it seems that prior to the plea he was already a second felony offender and if he pleaded guilty he faced a possible maximum sentence of 60 years. Fields was sentenced to 10 to 12 years.

Waterman and Devine stood trial and following their conviction for robbery first degree, grand larceny second degree and assault second degree, they received sentences of 15 to 20 years. The Appellate Division in *Peop.* v. *Waterman*, 12 A. D. 2d 84, reversed the convictions and the Court of Appeals affirmed on the ground that it was constitutional error to admit into evidence the post-indictment statement of Waterman taken in the absence of counsel, 9 N. Y. 2d 561 (1961). Waterman and Devine

later pleaded guilty to assault second degree and were sentenced to 2½ to 3 years.

Dash then brought *coram nobis* proceedings, seeking treatment similar to Waterman and Devine on the ground that his confession had induced his plea of guilty, and he also claimed his plea was coerced by the judge's threat. His petition was denied by all courts although in the Court of Appeals two judges voted to remand for a hearing as to whether the guilty plea was coerced. In its memorandum decision, 16 N. Y. 2d 493 (1965), the Court of Appeals, because *Jackson* v. *Denno, supra,* had but recently been decided, expressly approved its earlier holding in *People* v. *Nicholson,* 11 N. Y. 2d 1067 (1962), that it would not listen to post-conviction attacks on confessions where defendants had pleaded guilty. The court wrote:

> "A defendant who has knowingly and voluntarily pleaded guilty may not thereafter attack the judgment of conviction entered thereon by *coram nobis* or other post-conviction remedy on the ground that he had been coerced into making a confession and that the existence of such coerced confession induced him to enter the plea of guilty. If a defendant desires to contest the voluntariness of his confession, he must do so by pleading not guilty and then raising the point upon the trial; he may not plead guilty and then, years later, at a time when the prosecution is perhaps unable to prove its case, assert his alleged constitutional violation. The issue as to whether the confession was illegally obtained is waived by the guilty plea."

Thereafter Dash knocked on the federal court doors of the Sourthen District.

In my view, Dash, advised by counsel, made a deliberate and voluntary choice that his interests were best served by

his plea of guilty. He must have known that Fields had made a statement to the police which implicated him; he did not know what Waterman and Devine might do.

But the petitioner says nothing about what counsel advised him, what he and counsel knew and what evidence was available to the state. We are not even told the name of counsel and whether counsel was retained or assigned. We do not know whether the victim of the robbery, Shedletsky, could identify Dash; obviously he had identified Fields who was caught soon after the crime.

As to the second ground for a hearing, the alleged threats of the judge, the New York Court of Appeals has passed upon this and has held in effect that not enough is alleged to require a hearing. I agree. The allegation seems to amount to little more than that the judge pointed out to the defendant, as indeed he should have, what he faced in the event of conviction, whether by trial or plea. Obviously the record does not bear the petitioner out as he alleges that "the threats made by the court was not a matter of open record." If we had before us an affidavit of counsel or any other reliable witness to support Dash's claim of judicial coercion there might be sufficient reason to order a hearing as we did in *U. S. ex rel. McGrath* v. *LaVallee*, 319 F. 2d 308 (1963) where the court thought the minutes were ambiguous. But here there is insufficient substantiation and the district court properly denied a hearing.

For these reasons I would affirm the judgments of the district courts which denied the petitions of Ross and Dash for writs of habeas corpus.

The enforcement of their criminal laws by the states is an area where federal courts should act with some care and with due appreciation of the consequences. When the Supreme Court decided *Fay* v. *Noia*, 372 U. S. 391 (1963), where it held that federal habeas corpus is still available to a state prisoner even though he has failed to appeal his conviction, Mr. Justice Clark in his dissent pointed out

that the floodgates were being opened. The following year state prisoners filed 3,531 petitions in federal courts, an 80% increase over the 1,903 petitions the year before. The tide rises year by year:

Fiscal Year	*State Prisoner Habeas Corpus petitions filed in the Districts Courts*[8]
1963	1,903
1964	3,531
1965	4,664
1966	5,162
1967	5,948
1968	6,331

As a majority of my colleagues have now clearly charted for all state prisoners who are imprisoned after pleas of guilty what they must allege in order to get a hearing, it will follow as surely as night follows day that the federal courts will be inundated with petitions which will total many times the 6,331 commenced in 1968.

Everywhere in the United States local courts and prosecutors are today having to cope with a steadily mounting increase in criminal cases each one of which requires two or three times more court time than was the case a few

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[8] The District of Columbia, the Canal Zone, Guam and the Virgin Islands are excluded. See the Annual Report of the Director of the Administrative Office of the United States Courts (p. II-44, preliminary ed. 1968).

Of the total of 27,539 such petitions filed during the period from 1963-1968, 3,581, or 13%, were filed in the district courts of the Second Circuit. See the annual reports of the Director of the Administrative Office of the United States Courts for the years 1963 (p. 201), 1964 (p. 221), 1965 (p. 183), 1966 (p. 175), 1967 (p. 205), 1968 (table C-3, preliminary edition).

years ago. Counsel is usually assigned at the beginning of the case, at least as early as the arraignment. Thereafter preliminary hearings are held on search and seizure, the admissibility of confessions, identification and other evidence. Only after such hearings have been decided adversely to the defendant, are cases tried or pleas of guilty entered. Thereafter appeals are taken, and in New York these may be taken even after pleas of guilty. But this will not be the end because the federal courts, if the views of my colleagues in these cases should prevail, must now entertain petitions from state prisoners who pleaded guilty years ago and hold thousands of hearings.

With these decisions we accelerate unmistakably the trend toward federal court supervision and correction of every possible error or supposed error which can be made in the prosecution of a state criminal case. What plea of guilty cannot be alleged to have been "coerced" for some fanciful reason? What is there left which cannot be argued to be a violation of due process, or an unequal protection of the laws? How is the most competent and experienced attorney who is assigned to represent a defendant to protect himself against any charges of incompetence or failure fully to advise a defendant regarding a proper defense to the charges or a settlement by way of guilty plea?

I wish to be counted among those who do not think federal judges were ever meant to review every state criminal proceeding or that there is any basis for supposing that they can reach a more just result than the state court judges. We would be well advised not to arrogate so much ultimate power to ourselves, as has been done by federal decisions the past six years, in the name of safeguarding constitutional rights, and to be chary of exercising such power except in the most compelling circumstances. We have gone far enough already; we should not take the further step which will lead to the review, in one guise or another, of every plea entered in a state court.

Appendix B

I would affirm the district court orders which denied the petitions.

MOORE, *Circuit Judge* (dissenting) (with whom Chief Judge Lumbard and Judge Friendly concur):

I would not differ from Judge Smith's thoughtful and carefully analytical opinions in this and the companion case, *United States ex rel. Dash,* including the comment "when to hold a hearing has apparently been complicated in this Circuit," were it not for the fact that these decisions well illustrate the "complicated" nature of the problem, namely, hearings directed in *Ross* and *Dash* and no hearing in *Rosen.*

My doubts and disagreement stem from the majority's assumption that "This case raises the narrow question whether a District Court should apply the standards of *Townsend* v. *Sain,* 372 U. S. 293 (1963), in determining whether to hold an evidentiary hearing upon a habeas corpus petition where the petitioner is confined after a plea of guilty and is contending that the plea was not voluntary, because it was induced by the existence, or threatened use, of an allegedly coerced confession."

The belief of four members of the Court in *Townsend* v. *Sain, supra,* as to the ineffectiveness of the so-called "standards" in actual application is well expressed in the dissenting opinion of Mr. Justice Stewart at 325-334. Furthermore, I find nothing in *Townsend* v. *Sain* which indicates that "where the petitioner in such a case has not received a 'full and fair evidentiary hearing' in a state court as to the voluntariness of the plea, a hearing be held in the federal District Court."

Townsend was convicted of murder after trial by jury; the habeas corpus proceeding was based upon the illegal admission of a confession obtained while he was under the

influence of drugs. The Supreme Court was not dealing with a plea of guilty, the circumstances under which it was made or, as here, the quality of the evidence in the petition attacking the plea. Therefore, the so-called "standards" of the majority in *Townsend* v. *Sain* relating to the development of the factual circumstances surrounding an illegal confession cannot be expected to be the standards which that Court would have set were it dealing with a situation in which a petitioner sought to repudiate a guilty plea.

Referring to the specific cases now under consideration: In *Ross*, the trial court had all the essential facts before it to render an objective decision, yet this court directs a hearing. In *Rosen*, in addition to allegations of the existence and threatened use of a coerced confession, there was proof that Rosen's wallet (comparable to the gun evidence in *Ross*) was found at the scene of the burglary and that he "'was represented at trial by [experienced] counsel whose competence he does not attack.'" Accordingly, this court finds that "the application was insufficient" to justify a hearing. In *Dash*, there was also the existence and threatened use of an allegedly coerced confession and a State-court-rejected claim of a threat by the trial judge to impose a maximum sentence if Dash were found to be guilty. This court holds that "In these circumstances there is an issue as to the motivation of the plea which cannot be resolved without a hearing."

If "motivation" is to be the test, of necessity there must be a hearing in all cases so that the prisoners' mental processes may be reviewed and appraised in the light of their present reflections over their now-much-regretted decisions to plead guilty. If our decision to consider *en banc* these three cases has been for the purpose of affording some "standards" for district court judges in their determinations as to when to hold a hearing, our deliberations and the results thereof have been an exercise in futility. The conclusion is obvious that appellate judges have chosen

to read the petitions differently in the three cases and that the strongest factual case for denial of a hearing, *Ross*, leads the group in reversal of the district court's appraisal of the merits of the application.

The answer is not to be found in generalities in the many cases in which hearings had actually been held in the district court. In this group are: *United States ex rel. Swanson* v. *Reincke*, 344 F. 2d 260 (2d Cir. 1965), *cert. denied* 382 U. S. 869; *Hall* v. *United States*, 259 F. 2d 430 (8th Cir. 1958), *cert. denied* 359 U. S. 947; *Watts* v. *United States*, 278 F. 2d 247 (D. C. Cir. 1960); *United States ex rel. Staples* v. *Pate*, 332 F. 2d 531 (7th Cir. 1964); *United States ex rel. Boucher* v. *Reincke*, 341 F. 2d 977 (2d Cir. 1965); and *United States ex rel. Siebold* v. *Reincke*, 362 F. 2d 592 (2d Cir. 1966).

None of these cases bear upon the issue "when to hold a hearing." This question must, and can, be determined only from the papers before the district judge. This truism, often overlooked or ignored, was succinctly stated in *United States* v. *Ellenbogen* (Anderson, *C. J.*; Lumbard, *Ch. J.* and Waterman, *C. J.* concurring), 365 F. 2d 982 (1966), as follows:

> "The trial court's exercise of discretion can only be tested in the light of the reasons disclosed at the time the motion was heard and not on the basis of more elaborate representations argued on appeal. *Ungar* v. *Sarafite*, *supra*, at 589, 84 S. Ct. 841."

Accepting the premise that the district judge has before him only the petition and possible supporting affidavits and the statement in *Glenn* that "a voluntary guilty plea entered upon advice of counsel is a waiver . . .," in my opinion inquiry should focus upon "voluntary" and "advice of counsel." In other words, has the petitioner met his burden of showing, in a factual and not a conclusory man-

ner, that pressures, deceptions or possibly mistakes of material facts of constitutional magnitude were the inducing cause of his guilty plea—the elements crucial to a decision by the district judge as to when to hold a hearing? To decide this question, the district judge must attempt to make an objective evaluation of an essentially subjective decision by the prisoner, to wit, what induced him to plead guilty? Sufficient factual allegations should be presented so that as accurate a reconstruction of the "guilty plea" scene may be made as possible. First, consider the confession. It was definitely made when Ross was "in custody." The custody, however, was not while under suspicion of the murder but rather in Sing Sing Prison where he was serving a sentence for attempted grand larceny. Second, at the time of his plea, Ross was represented by competent counsel. Third, Ross knew that a co-defendant, Jenkins, had confessed and would testify against him. Fourth, Ross knew where the gun, the murder weapon, was. Fifth, Ross' attorney knew of Ross' claim and professed desire to repudiate the confession. Against the background of these facts, Ross pleaded guilty. There is no showing that Ross did not understand their effect on a possible conviction of first-degree murder or that he did not have a full opportunity to discuss all the facts with his attorney and weigh their consequences. Ross has produced no facts indicating incompetence of counsel or inadequacy of access to him.

Upon all the facts, I conclude that the district judge properly exercised his discretion in denying the petition without directing a hearing. Ross, in my opinion, has failed to meet his burden of showing that his plea was involuntary. In a way, every plea is "involuntary" because the defendant is forced—even coerced—by the situation then facing him to make a decision and to choose between the two evils which then confront him. If he chooses the lesser of the two evils, he is scarcely making a "voluntary" (in a Websterian sense) decision. Probably the test

should be an "understanding" decision to be determined as objectively as possible—therefore, the importance of the factual allegations. To be sure, Ross' choice obviously was not easy or pleasant. He alone had to make that choice in the light of his own secret knowledge of his guilt or innocence, the not so secret knowledge of the gun and Jenkins' proof, and aided by the practical and objective advice of counsel.

I do not differ with the majority's statement that "The question to be answered in any case involving a collateral attack on a conviction based on a plea of guilty is usually expressed in terms of whether or not the plea was a 'voluntary' act."—but this is not the question now before us. Nor are we faced with the hypothesis suggested by them, that we would be holding that a coerced confession may never be raised as a factor rendering a plea involuntary. I would not so hold and do not find that our own cases reach this result.

Affirmatively, I would hold that an appellate court should not follow the line of least resistance, namely, to grant a hearing in every case and, thus, by their decisions deter district judges from deciding cases without a hearing where no substantial showing has been made by petitioners that their pleas of guilty were involuntary. This leads me to the conclusion that we should adhere to our supposed appellate function and pass upon the district judge's judgment and not consider the case *de novo*. Using this standard, I find that upon the facts before him in this case, he properly denied the petition without a hearing.

I am not unmindful of the decision in *United States ex rel. Richardson* v. *McMann* (also decided this day). That case presents an unusual exception to the principle that a district judge can pass only upon the papers before him. There we took into consideration the allegations placed before us in an affidavit presented for the first time in the

appellate brief which raised, in effect, the question of inadequate representation of counsel. Whether these charges are frivolous and possibly perjurious or are based upon fact could not have been determined on the papers before us. Under these special and exceptional circumstances, we felt that the interests of justice required a hearing at which all parties vitally interested in establishing the true situation could be heard.

The *Richardson* case is not in my opinion in any way controlling on the problem here, and I would affirm the district judge's decision.

FRIENDLY, *Circuit Judge* (dissenting) (with whom Chief Judge Lumbard and Judge Moore concur):

No decision of the Supreme Court has held or even intimated that an accused who has been convicted upon a guilty plea, made on the advice of counsel after full explanation of its consequences and without coercion or trickery of any sort by the state, and thus "voluntary" in the ordinary use of language, is entitled to have the conviction set aside because the plea was influenced in greater or less degree by a previous act of the state in violation of his constitutional rights.

The two decisions relied on in the majority opinion are *Machibroda* v. *United States*, 368 U. S. 487 (1962), and *Harrison* v. *United States*, 392 U. S. 219, 223 (1968). *Machibroda* was the archetype of a claim of an involuntary plea in the time-honored sense; the defendant alleged this had been made on the faith of a promise by an Assistant United States Attorney that was not performed. While the Court's statement, quoting *Kercheval* v. *United States*, 274 U. S. 220, 223, that guilty pleas should not be accepted "unless made voluntarily after proper advice and with full

understanding of the consequences" is indeed clear, as a concurring opinion here states, what is equally clear is that the Court was not speaking at all to the issue whether a plea so made can nevertheless be set aside, long after the defendant has gotten the benefit of his bargain and when the state has lost its ability to prosecute, because of previous allegedly impermissible conduct by the state. The quotation followed the hardly novel affirmation that "A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void." The sole issue in the case was whether Machibroda had alleged enough to have a hearing. The Justices who decided he had could scarcely have believed they were settling the altogether different and highly important issue we have before us here. The decision by a sharply divided Court in *Harrison* dealt with still another problem, of rather small practical dimensions, the use of testimony at a previous trial that was claimed to have been induced by a previous illegally obtained confession.

The effort of the concurring opinion to fill the void with an extract from *Herman* v. *Claudy*, 350 U. S. 116, 118 (1956), is a dismal failure. It is true that Mr. Justice Black there stated, to give the quotation in full, "Our prior decisions have established that: (1) a conviction following trial or on a plea of guilty based on a confession extorted by violence or mental coercion is invalid under the Federal Due Process Clause." However, none of the six decisions cited in support of that statement related to guilty pleas. The *Herman* case did concern such a plea but the opinion must be read in the context of petitioner's allegations, 350 U. S. at 119, that:

> "The assistant prosecuting attorney demanded that petitioner sign a plea of guilty to all the charges. When petitioner asked what he was signing, the assistant

> prosecuting attorney said 'Sign your name and forget it.' Petitioner was not informed of the seriousness of the charges by the prosecutor or the judge; he did not know that his plea of guilty could result in a maximum sentence of some 315 years; he did not know nor was he informed that he could have counsel. Petitioner pleaded guilty to all of the charges against him. He says now he was innocent of all but one."

No cumulation of resounding adjectives can conceal the chasm separating *Herman* v. *Claudy* from the case before us. If any such facts had been presented here, there would have been no *in banc* and no dissents. To regard a phrase in the *Herman* opinion as compelling decision without regard to the totally different facts that gave rise to it is to ignore rather than to follow the genius of the common law system.[1]

Our own previous opinions point away from the determination now made rather than toward it. While the court sitting *in banc* is free to engage in a new departure, I perceive no sufficient reason for embarking on an uncharted course that will impose a tremendous burden on state and federal judges, prosecutors and lawyers furnishing assistance to the indigent and, to the small extent it has any practical effect, will further impair the ability of society to protect itself "against those who have made it impossible to live today in safety." *Harrison* v. *United States, supra*, 392 U. S. at 235 (dissenting opinion of White, *J.*, see also dissenting opinions of Black, *J.* and Harlan, *J.*).

The court's opinion supplies no intelligible guidelines to

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[1] The same comment applies to the reference to a characterization of *Herman* in *United States ex rel. Vaughn* v. *LaVallee*, 318 F. 2d 499 (2 Cir. 1963), where this court approved denial of habeas corpus to a petitioner who alleged that his guilty plea was induced by an illegal search.

help lower courts in handling the Herculean task it assigns them. A hearing must be had whenever a prisoner makes "particularized allegations as to how that confession rendered his plea involuntary." This test will speedily become well known in the prisons and is exceedingly easy to meet; the error made by the relator in *United States ex rel. Rosen* v. *Follette*, decided herewith, will not be repeated. The court gives almost no aid concerning the standard for ruling on petitions after a hearing has been held. Is it enough that the illegal confession was *a* factor or must it have been an *important* factor? And how can anyone tell? Isn't a confession almost inevitably an important factor except when the other evidence is overwhelming? Even if the standard were framed a bit more rigidly so as to require a showing that the plea would not have been made "but for" the confession, the trial courts are being given a job impossible of successful performance. Despite superficial similarity, this issue is actually quite different from determining whether a plea of guilty was "voluntary" in the traditional sense. To decide that issue the court need only determine whether unfair pressures were applied; if they were, *non constat* that the defendant would have pleaded guilty without them. For the same reason the question is also less susceptible of satisfactory answer than deciding whether a confession was "voluntary"; yet lack of confidence in the ability of judges to handle that issue underlay the prescription of specific rules on police interrogation in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Even in what would seem the strongest case for the prisoner, namely, where a confession illegally obtained when other evidence was then lacking has been speedily followed by a guilty plea, how can anyone ever know whether the accused would not have made the same decision anyway, because of his knowledge of the availability of additional evidence and the consequent attractiveness of a lower sentence? The only cases concerning which there can be reasonable cer-

tainty are those at the opposite end of the spectrum, where there was so much untainted evidence that the confession could not have been a significantly motivating factor. If the "but-for" test is the right one, the instances where a court will be required to set aside a guilty plea will thus be a small fraction of the fraction in which a confession was illegally obtained; in an even smaller fraction of these would the defendant have escaped conviction; and the fraction in which he was innocent will, of course, be infinitesimal. If ever a situation called for heeding Mr. Justice Jackson's admonition against seeking needles in haystacks, *Brown* v. *Allen*, 344 U. S. 443, 536-39 (1953) (concurring opinion), and enabling courts and lawyers to devote their limited time to worthier causes, this is it.

On the other hand, any standard less severe than the "but-for" test would be grossly unfair to the state, and even this is unfair enough. In contrast to the situation where the legality of a confession has been tested before or in the course of a trial, the prosecutor will generally have dismantled whatever material he had. If the constitutional claim succeeds, the state will rarely be able to conduct the trial that is all the defendant deserves on any view, even though sufficient untainted evidence was available when he pleaded guilty years before. Here, if Ross had elected to stand trial for murder fourteen years ago, Jenkins would have been an important witness against him; we are not told whether Jenkins is still available but, even if he is, his evidence concerning events of 1954 will not be very convincing. The way to protect both the accused and society with respect to this problem, is through statutes like §§ 813-c and 813-g of the New York Code of Criminal Procedure which allow the defendant to move in advance of plea to suppress the fruits of an unconstitutional search or an illegally obtained confession and, if the motion is denied, to plead guilty and nevertheless appeal; a record

is thus made and, if the accused prevails, he can be tried before too much time has elpased since the crime. With these statutes taking care of the future, I would leave the past where these prisoners were content to have it.

I recognize that the court apparently limits itself for the time being, to New York confessions antedating *Jackson* v. *Denno,* 378 U. S. 368 (1964), and postpones the problems with respect to later New York confessions, those in Connecticut and Vermont, and illegal searches and seizures. I realize also that a special argument can be formulated concerning these pre-*Jackson* confessions on the basis that the accused had no constitutionally acceptable way to test their legality. But the pejorative overtones of such a statement considerably outrun the fact. While the procedure prescribed by *Jackson* is a substantial improvement, the previous New York practice was a long way from denying an accused a reasonable opportunity to have the validity of his confession determined. The majority in *Jackson* conceded that New York's belief in the fairness of its procedure was "not without support in the decisions of this Court," 378 U. S. at 395, notably *Stein* v. *New York,* 346 U. S. 156 (1953), and four Justices found nothing constitutionally wrong with it. Furthermore there was always the opportunity to resort to federal habeas corpus in the event of conviction and to have the voluntary nature of the confession tested there. The case where a defendant otherwise willing to stand trial was forced into a guilty plea by the difference between pre-*Jackson* and post-*Jackson* procedures with respect to confessions, is thus a construct of the fertile brains of defense lawyers without counterpart in reality.

The rhetoric in the concurring opinion is badly misplaced. The issue is not whether Ross and others like him should be denied rights accorded them under the due process clause, which all would agree they should not, but whether,

after having made a bargain recommended by competent counsel with full knowledge of the facts and the consequences, they should now be permitted to repudiate it on grounds whose availability was then well known to them, at a time when the state is unable effectively to controvert either their claims of illegality or prove their guilt. Any morality in this position altogether eludes me. It is high time to recall that, even with respect to criminal defendants, a bargain is a bargain if made by an intelligent man with full protection from the court and on the advice of counsel. The thousands of tedious journeys which we here inflict on state and federal judges cannot be justified by any real prospect that a few innocent defendants may be found at the end of the tunnel. Men who first confess and then, on the advice of counsel, plead guilty to serious crimes, do so because they are.

For these reasons, as well as those given by my brothers Lumbard and Moore, in whose opinions I join, I decline to participate in opening up a large new area where New York criminal convictions have been thought until this time to possess finality.

Appendix B

Circuit Court Opinions—Richardson.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 371—September Term, 1967.

(Argued April 1, 1968 Decided February 26, 1969.)

Docket No. 31402

UNITED STATES *ex rel.* WILLIE RICHARDSON;

Appellant,

—against—

DANIEL MCMANN, Warden, Clinton Prison, Dannemora, New York,

Appellee.

Before:

MOORE, WOODBURY* and SMITH,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Stephen W. Brennan, *Judge*, denying appellant's petition for a writ of *habeas corpus*, application for reargument, and application for a certificate of probable cause.

Reversed and remanded for a hearing.

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* Of the First Circuit, sitting by designation.

Appendix B

JOHN T. BAKER, New York, N. Y., *for appellant.*

LILLIAN Z. COHEN, Assistant Attorney General, New York, N. Y. (Louis J. Lefkowitz, Attorney General of the State of New York, New York, N. Y.; Samuel A. Hirshowitz, First Assistant Attorney General, New York, N. Y., of counsel), *for appellee.*

MOORE, *Circuit Judge*:

This is an appeal from an order denying appellant's* petition for a writ of habeas corpus, for reargument and for a certificate of probable cause without an evidentiary hearing to determine the voluntariness of appellant's plea of guilty of second degree murder in the Supreme Court, New York County (28 U. S. C. § 2253).

On March 24, 1963, two of appellant's relatives were found murdered in their apartment and on the same day appellant was taken into custody. He told police that he had been in his relatives' apartment at the time an altercation between them began and claimed that he had attempted to break it up and, in so doing, got blood on his clothes. He was later booked for homicide and shortly thereafter, signed a confession. On April 20th, appellant was indicted in New York County, New York, for murder in the first degree and two attorneys were assigned to represent him. On that date he pleaded not guilty. On July 22nd, appellant withdrew his plea of not guilty to first degree murder and entered a plea of guilty to murder in the second degree under the first count of the indictment to cover both counts of the two-count indictment. He was convicted on that plea and was sentenced on October 9, 1963, to a term of 30 years to life.

* Appellant refers to relator, Willie Richardson.

Appendix B

A subsequent motion to suppress the confession was treated as an application for a writ of error *coram nobis* and was denied without a hearing on July 27, 1964, by the Supreme Court, New York County. The Appellate Division affirmed without opinion. *People* v. *Richardson*, 23 A. D. 2d 969 (1st Dep't 1965). Leave to appeal to the New York Court of Appeals was denied on June 8, 1965. State court remedies have been exhausted.

Appellant presented a petition to the district court in which he alleged in substance that his plea of guilty to a reduced charge in the State court was invalid because it was induced by the existence or threatened use of an allegedly coerced confession.

Accompanying his brief to this Court, appellant has annexed an affidavit entitled "SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS" and claims that because he was without counsel when he filed his petition he "failed to include several facts" relevant to his petition and to his appeal. This affidavit was not before the district court which had no opportunity to consider it or the "facts" therein set forth. Despite the fact that this supplemental affidavit is not a part of the district court record, it is received so that the matters therein alleged may be thoroughly investigated and, if possible, the truth ascertained.

Appellant states in this affidavit that after indictment for first degree murder (1) Alfred Rosner, Esq., was assigned to represent him; (2) that Mr. Rosner came to see him the last week of June or the first week of July 1963; (3) that his entire visit "lasted approximately 10 minutes"; (4) that although Mr. Rosner asked what happened, he "did not take any notes"; (5) that "He [Mr. Rosner] told me [appellant] that he would get paid the same amount of money for representing me [appellant] regardless of the outcome"; (6) that "He [Mr. Rosner] did not mention

what he intended to do to help me [appellant] or prepare my case"; (7) that the next time (July 22, 1963) he saw Mr. Rosner after the first visit in jail was when appellant was taken to the courtroom; (8) that three or four minutes before the proceeding began, Mr. Rosner told appellant that he should change his not guilty plea to a plea of guilty of second degree murder; (9) that appellant protested that he was not guilty, that the confession was taken because of fear and physical beatings but that Mr. Rosner said that it was not the proper time to bring up the confession and that a guilty plea would save his life and "then I [appellant] could later explain by a writ of habeas corpus how my confession had been beaten out of me"; (10) that Mr. Rosner said that "the District Attorney, Mr. Hogan, was an extremely tough man and that he would be in court later"; (11) that Mr. Rosner told appellant that "the confession would in all probability get me [appellant] the electric chair and that he could attack the confession later without risking his life; that these were the motivating reasons for the change of plea, and that "I [appellant] did not plead guilty because I had committed the crime."

In contrast to this supplemental affidavit signed by Willie Richardson and notarized under a "County of New York" heading on January 15, 1968, by William E. Donahue, the record of the change of plea proceedings on July 22, 1963, before the Hon. George Pastel of the New York Supreme Court, Special and Trial Term, Part 34 (appellant's appendix) shows that appellant was represented by two attorneys, Alfred I. Rosner, Esq., and William P. McCooe, Esq.; that the following colloquy took place between Court and the defendant [appellant here]:

> The Court: Now, did you discuss this case fully with Mr. McCooe and Mr. Rosner?
>
> The Defendant: Yes, sir, I did.

The Court: Did you understand them when you spoke to them about your case?

The Defendant: Yes, sir.

The Court: Were you threatened in any manner, shape, or form, by anyone in order to induce you to take this plea?

The Defendant: No, sir.

The Court: Are you taking this plea of your own free will and volition?

The Defendant: Yes, sir.

The Court: Have any promises been made to you by anyone, that is, your counsel, the District Attorney, the court officers, jail keepers, or anybody, concerning the sentence which this Court, meaning I, will impose in this case?

The Defendant: No, sir.

The Court: You are taking this plea of your own free will and volition?

The Defendant: Yes, sir.

The Court: Have any promises—without any promises of whatever kind or nature so far as sentence is concerned; is that right?

The Defendant: Yes, sir.

In *Townsend* v. *Sain*, 372 U. S. 293, 312-13 (1963), the Supreme Court stated the principle for determining when an evidentiary hearing must be held in a *habeas corpus* case:

> "... Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts."

This basic principle holds true unless a petitioner's allegations are "vague, conclusory, or palpably incredible," *Machibroda* v. *United States*, 368 U. S. 487, 495 (1962), or are "patently frivolous or false," *Commonwealth of Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116, 119 (1956).

Shortly after the decision in *Townsend* v. *Sain*, this court had occasion to consider the requirement of holding an evidentiary hearing in a *habeas corpus* case presenting, as here, an issue of the voluntariness of a guilty plea. In *United States ex rel. McGrath* v. *LaVallee*, 319 F. 2d 308, 311-12 (2d Cir. 1963), this court stated:

> "When the petition in support of an application for *habeas corpus* reveals upon its face that it is defective as a matter of law, the habeas court may dismiss the application without a hearing. . . . Moreover, a hearing is not required when the habeas court has before it a full and uncontested record of state proceedings which furnishes all of the data necessary for a satisfactory determination of factual issues. . . . When, however, petitioner alleges that a guilty plea entered by him was the product of deceit, promise, or threat, and facts are specifically set forth which support that allegation and which create issues incapable of resolution by a simple examination of the files and records before the federal District Court, that court must grant the petitioner a hearing. Certainly, petitioner cannot be denied a hearing merely because the facts asserted by him are contradicted by the answer of the State's prosecuting officers, for it is this denial which creates the factual issue to be resolved." [Citations omitted.]

The court below considered only the transcripts of the minutes of the proceedings when the plea was entered and sentence imposed along with appellant's petition, and con-

cluded that appellant's plea was voluntarily entered and, therefore, no hearing would be necessary.

A conviction which is based upon an involuntary plea of guilty is inconsistent with due process of law and is subject to collateral attack by federal *habeas corpus*. *McGrath, supra,* 319 F. 2d at 311; *United States ex rel. Seibold* v. *Reincke,* 362 F. 2d 592, 593 (2d Cir. 1966). And the Supreme Court has stated that "a conviction following trial or on a plea of guilty based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause." *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116, 118 (1965).

In *United States ex rel. Vaughn* v. *LaVallee,* 318 F. 2d 499 (2d Cir. 1963), this court stated that "[a] plea of guilty which is prompted by fear that unconstitutionally obtained evidence will be used at trial will not sustain a conviction." This statement, however, was subsequently rejected in *United States ex rel. Glenn* v. *McMann,* 349 F. 2d 1018 (2d Cir. 1965), *cert. denied,* 383 U. S. 915 (1966). The petitioner in *Glenn* argued that his plea of guilty had been coerced by the existence of an alleged involuntary confession. The district court, however, denied the writ of habeas corpus without an evidentiary hearing after finding that the petitioner had failed to exhaust his state remedies. This court denied the petitioner's request for leave to proceed *in forma pauperis* and for assignment of counsel on a different ground, saying:

> "A voluntary guilty plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings against him. *United States ex rel. Swanson* v. *Reincke,* 344 F. 2d 260 (2d Cir. 1965); *United States ex rel. Boucher* v. *Reincke,* 341 F. 2d 977 (2d Cir. 1965). Any language to the contrary in *United States ex rel. Vaughn* v. *LaVallee,*

318 F. 2d 499 (2d Cir. 1963) is herewith disavowed." 349 F. 2d at 1019.

The issue of voluntariness had not been briefed, but the decision was apparently based upon a finding that the petitioner had not raised a genuine issue of fact in connection with the voluntarines of the plea.

In *United States ex rel. Martin* v. *Fay,* 352 F. 2d 418 (2d Cir. 1965), *cert. denied,* 384 U. S. 957 (1966), this court reaffirmed the holding of *Glenn.* As Judge Waterman (whose concurrence was based on the exhaustion rule) pointed out, the word "voluntary" as used in the majority opinion was ambiguous, the majority opinion seemingly holding that either representation by counsel or a review of the colloquy between the prisoner and the judge was conclusive on the issue of the voluntariness of the guilty plea. Judge Waterman wrote: "I conclude that the majority may have in mind that unless a guilty plea is the product of force directly applied to the speaker at the time he pronounces the word 'Guilty,' no extenuating circumstances of any kind will justify a court in inquiring into events preceding this plea." 352 F. 2d at 419-20.

The weight of authority supports the holding of *Glenn* and *Martin, supra,* to the extent that a *voluntary* guilty plea waives all non-jurisdictional defects. See *United States ex rel. Rogers* v. *Warden,* 381 F. 2d 209, 213 (2d Cir. 1967) and cases cited therein. The explanation for this rule was given in *Kercheval* v. *United States,* 274 U. S. 220, 223 (1927), as being that "a plea of guilty differs in purpose and effect from a mere admission on an extra-judicial confession, it is itself a conviction. Like a verdict of a jury, it is conclusive. More is not required; the court has nothing to do but give judgment and sentence."

However, if a voluntary guilty plea is to be equated with a waiver of important constitutional rights, it is only

logical that the standards for determining voluntariness must be as high as those for wavier. The presence of counsel and the conversation between judge and prisoner at the time the plea is taken are not necessarily conclusive on the question of whether the plea was voluntary. While these factors are relevant in determining whether the plea was voluntary, there may well be situations in which other matters which are outside the record must be considered in making that determination.

In this case, the petitioner alleges that his guilty plea was the result of the threatened use of a coerced confession, that he did not want to plead guilty and wanted to assert his claim that the confession was coerced, but that his attorney inaccurately informed him that this was not the proper time to bring up the matter and that the claim should be presented at a later time. The decisions of a number of other circuits indicate that a petitioner would be entitled to an evidentiary hearing where somewhat similar allegations are made. See *Carpenter* v. *Wainwright*, 372 F. 2d 940 (5th Cir. 1967); *Doran* v. *Wilson*, 369 F. 2d 505, 507 (9th Cir. 1966); *Shelton* v. *United States*, 292 F. 2d 346, 347 (7th Cir. 1961), *cert. denied*, 369 U. S. 877 (1962). In *Smith* v. *Wainwright*, 373 F. 2d 506, 507-8 (5th Cir. 1967), a case almost identical in its facts to the present appeal, it was stated: "Where the guilty plea has been made after one fifteen-minute conference during which an entire capital case, including an allegedly coerced confession, had to be considered, a hearing is clearly called for to ascertain whether the guilty plea was freely made, without infection from the confession and with 'effective assistance of counsel.'"

The existence or threatened use of a coerced confession may not itself render the guilty plea involuntary. A defendant who has a basis for claiming that his confession was coerced may nevertheless elect to forego that claim and

to plead guilty—whether because of "his own knowledge of his guilt and a desire to take his medicine," *Doran* v. *Wilson*, 367 F. 2d 505, 507 (9th Cir. 1966); because "he also knows that other admissible evidence will establish his guilt overwhelmingly," *White* v. *Pepersack*, 352 F. 2d 470, 472 (4th Cir. 1965); because he prefers to plead guilty to a lesser charge rather than run the risk of conviction on a more serious charge; or because for some other reason he determines that it is in his best interest to plead guilty. A defendant who knowingly and deliberately follows this course should not be in a better position, with regard to the subsequent assertion of such claims on collateral attack, than the defendant who fails to object at trial.

Of course the exploration of these considerations virtually compels disclosure of what occurred between defendant and his counsel. Petitioner, having alleged what was told him and what was not, has waived his privilege against disclosure and his counsel is free to disclose whatever took place between him and his client.

The case is remanded for a hearing to develop all the facts with directions that the hearing be transferred to the Southen District of New York and be held with all reasonable expedition before one of the Judges of said District. In the event that the facts as ultimately found warrant further proceedings, consideration should be given thereto by the appropriate authorities.

On the hearing directed hereby to be held, special attention should be given to the statement given under oath by appellant that he did not plead guilty because he had committed the crime and to appellant's answers on July 22, 1963 under the Court's specific questioning:

> The Court: Now, did you commit this crime?
>
> The Defendant: Yes, sir.
>
> The Court: Now, did you on or about March 24, 1963, in the County of New York, wilfully and feloni-

ously strike Rosalie Smith with a knife, thereby causing her death?

The Defendant: Yes, sir.

Serious charges five years after the event are made under oath against a member of the Bar appointed by the Court to represent appellant in defense of a first degree murder indictment, which can be summarized as inadequate representation to say the least. Full opportunity should be given to Mr. Rosner and his co-counsel to present their versions of the facts. Appellant and the Assistant District Attorney were also participants in the events of July 22, 1963; the appellant, the notary and probably others in the events of January 15, 1968.

John T. Baker, Esq., whose able representation of appellant is appreciated by this Court, is assigned to represent appellant, Willie Richardson, on the hearing.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 48—September Term, 1968.

(Argued September 10, 1968 Decided March 20, 1969.)

Docket No. 30964

UNITED STATES OF AMERICA *ex rel.*
McKINLEY WILLIAMS,

Petitioner-Appellant,

—v.—

HON. HAROLD W. FOLLETTE, Warden of Green Haven State Prison, Stormville, N. Y.,

Respondent-Appellee.

Before:

LUMBARD, *Chief Judge,*
SMITH and ANDERSON, *Circuit Judges.*

Appeal from judgment and order of the United States District Court for the Southern District of New York, Thomas F. Croake, *Judge,* denying without hearing application for writ of habeas corpus.

Reversed and remanded.

GRETCHEN WHITE OBERMAN, New York, N. Y. (Anthony F. Marra, New York, N. Y., on the brief, *for petitioner-appellant.*

Appendix B

MURRAY SYLVESTER, Asst. Attorney General, State of New York (Louis J. Lefkowitz, Attorney General and Samuel A. Hirshowitz, First Asst. Attorney General, on the brief), *for respondent-appellee.*

SMITH, *Circuit Judge:*

This is an appeal by McKinley Williams from an order of the United States District Court for the Southern District of New York, Thomas F. Croake, *J.*, denying, without a hearing, his application for a writ of habeas corpus. Reversed and remanded for a hearing to determine the voluntariness of Williams' guilty plea.

On January 23, 1956, Mabel Cummings was held up with a toy pistol, raped, and robbed. Two days later Williams was arrested, and while in police custody he confessed. On March 16, 1956, he appeared in Bronx County Court and entered a plea of guilty on the advice of his lawyer. On April 19, 1956, Williams was convicted of second degree robbery on his plea of guilty and was sentenced to 7½ to 15 years in prison as a second felony offender. No appeal was taken from the judgment of conviction.

In 1964 petitioner applied for a writ of error *coram nobis* to vacate this conviction. In his petition, Williams stated that he was arrested without a warrant and taken to the Simpson Street police station where he was held on an "open" charge, that he was held for 16 hours before being arraigned, that he was handcuffed to a desk while interrogated by police about a two-day old crime, that he was threatened with a pistol and physically abused, that he was not informed of his right to counsel, and that he gave a confession out of fear and exhaustion. He also al-

leged that he was inadequately represented by assigned counsel; that he did not want to plead guilty; that his attorney (who was later disbarred), knowing of an alibi defense, talked him into pleading guilty and misled him into thinking that he was pleading guilty to a misdemeanor rather than a felony. He allegedly was not told of the consequences of his plea or the nature or meaning of the charge. Faced with the allegedly coerced confession, and the New York procedure, later declared unconstitutional in *Jackson* v. *Denno,* 378 U. S. 368 (1964), whereby the jury would determine the voluntariness of his confession, Williams entered the guilty plea.

His writ was denied without a hearing in the state courts, and thereupon Williams applied for a writ of habeas corpus in the United States District Court for the Southern District of New York. Judge Croake denied Williams' petition without a hearing on the basis of *United States ex rel. Glenn* v. *McMann,* 349 F. 2d 1018, 1019 (2 Cir. 1965), cert. denied 383 U. S. 915 (1966), where we said that "a voluntary plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings." In addition, Judge Croake said that he had some difficulty accepting "the assertion that the right to go to trial was relinquished because [petitioner] believed he would not receive a fair determination on the issue of voluntariness," since Williams entered his plea of guilty almost eight years prior to the Supreme Court decision in *Jackson* v. *Denno, supra.*

In *United States ex rel. Ross* v. *McMann,* Docket No. 32140, slip op. 3853 (2 Cir. February 26, 1969) (*en banc*), and its companion case, *United States ex rel. Dash* v. *Follette,* Docket No. 30420, slip op. 3867 (2 Cir. February 26, 1969) (*en banc*), we held that while a voluntary guilty plea constitutes a waiver of all non-jurisdictional defects, a conviction based on a guilty plea is open to collateral

attack if the petitioner can show that the plea was not in fact voluntary. Explaining that it was wrong to read *Glenn* as an absolute bar to collateral attack when there is an issue as to the motivation of the plea, we said that there must be a hearing where the constitutional violations alleged are not irrelevant to the issue of voluntariness. A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is denied. *Machibroda* v. *United States,* 368 U. S. 487, 493 (1969). The applicable principle was stated by the Supreme Court in *Townsend* v. *Sain,* 372 U. S. 293, 312-313 (1969):

> Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair subsidiary hearing in a state court, either in the use of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.

In *Ross* and *Dash* we also rejected the argument that Williams who refused to run the pre-*Jackson* gauntlet was said to have deliberately waived the right to test the voluntariness of their confessions. "The petitioner herein was deemed to have waived his coerced confession and was deliberately by-passing state procedure when the witnesss failed to afford a constitutionally acceptable reason presenting that claim, and he cannot be deemed and has entered a voluntary guilty plea if the plea was substantially motivated by a coerced confession the validity of which he was unable, for all practical purposes, to contest." *United States ex rel. Ross* v. *McMann, supra* at slip op. 3866.

For the reasons set forth in *Ross* and *Dash,* we think that the allegations in Williams' petition are sufficient to require a hearing on the voluntariness of his guilty plea. He says that he was threatened with a pistol and that he confessed to a "tale" narrated by a plainclothesman. He says that the confession was the only evidence against him, an allegation which, if true, makes this an even stronger case than *Ross* or *Dash.* He says that he was not even in the state at the time of the alleged crime. None of these allegations are controverted by the record. Unlike *United States ex rel. Rosen* v. *Follette,* Docket No. 32264, slip op. 3907 (2 Cir. February 26, 1969) (*en banc*), therefore, Williams' petition alleges significantly more than the "rather vague claim that the plea was somehow infected by the confession." Slip op. at 3911.

Despite six *corum nobis* applications in New York, Williams has never had a state hearing, and yet plainly the allegations in his petition raise questions which cannot be answered by reference to the transcript alone. If petitioner pleaded guilty on the advice of a lawyer who knew of the existence of a perfectly good alibi defense, then there is certainly some question as to whether Williams was adequately represented by counsel when he entered his guilty plea. "[I]t is not for a lawyer to fabricate defenses, but he does have an affirmative obligation to make suitable inquiry to determine whether valid ones exist." *Jones* v. *Cunningham,* 313 F. 2d 347, 353 (4 Cir.), cert. denied 375 U. S. 832 (1965). See also *Quarles* v. *Balkcom,* 254 F. 2d 985 (5 Cir. 1966), where the Fifth Circuit held that the petitioner, who was incarcerated in a county jail on the date of the alleged crime, was entitled to an evidentiary hearing to show that his guilty plea was a "mistake" and that the plea was induced by inadequate representation of counsel.

Similarly, if petitioner was misled by his lawyer into thinking he was pleading guilty to a misdemeanor, there

is some question as to whether the guilty plea was made "intelligently." Compare *United States ex rel. Boucher* v. *Reincke,* 341 F. 2d 977 (2 Cir. 1965). Indeed, the Supreme Court has said that withdrawal of a guilty plea should be allowed if it has been "unfairly obtained or given through ignorance, fear or inadvertence." *Kercheval* v. *United States,* 274 U. S. 220, 224 (1927). Under these circumstances, the petitioner is entitled to an evidentiary hearing to determine whether "the guilty plea was freely made without infection from the confession and with 'effective assistance of counsel.'" *Smith* v. *Wainwright,* 373 F. 2d 506, 508 (5 Cir. 1967).

This does not mean, of course, that the petitioner will necessarily prevail on the merits, but we think that he has alleged enough to require a hearing. As we said in *Ross* and *Dash,* the conviction would stand if the habeas judge determined either that the confession was voluntary and that petitioner was represented by competent counsel, or if petitioner was unable to show that the plea was substantially motivated by the confession or the alleged incompetence of assigned counsel.

We reverse and remand with instructions to hear and determine petitioner's application unless a hearing is held by the courts of the state determining under the standards set forth herein the issue of the voluntariness of petitioner's plea within 60 days from the date of issuance of the mandate herein, or such further time as the District Court may for good cause allow.

LUMBARD, *Chief Judge* (dissenting):

I dissent.

The majority now require the state court, or perhaps the federal court in addition, to inquire into the voluntariness of a plea of guilty entered by Williams in the Bronx

County Court in March 1956 to robbery in the second degree in settlement of an indictment which charged 5 felonies including rape and robbery. The trial court must now also inquire into the voluntariness of the confession which Williams claims he made and which he also claims was the inducing cause of his plea of guilty.

For the reasons set forth in my dissenting opinion in *United States ex rel. Ross* v. *McMann,* slip opinion filed February 26, 1969, at pages 3879 to 3894, I would not require a trial court to inquire into the voluntariness of a plea of guilty entered in a state court prior to the Supreme Court decision in *Jackson* v. *Denno,* 378 U. S. 368 (1964), where the claim is that the plea was induced by an involuntary confession.

In addition it seems to me that the claims of Williams are insubstantial on their face. It seems highly unlikely on this record that the only evidence against Williams could have been his own confession, as he now claims. The charges in the indictment included holding up one Mabel Cummings with a toy pistol, raping her and robbing her. The record discloses no allegations which make it believable that Mabel Cummings could not and would not have testified that Williams was her assailant. Such testimony would usually be sufficient to convict.

Nor is Williams' claim that he had alibi evidence which would have shown that he was out of the state at the time any more believable, as he gives no particulars whatever with respect to such evidence and to his assertion that he advised his attorney of such an abili and that his attorney failed to do anything about it.

Williams' petition is unbelievable in still another respect—his claim that his lawyer led him into thinking he was pleading to a misdemeanor when he pleaded to robbery in the second degree. This claim is especially incredible in light of the facts that Williams was a second

felony offender and that he failed to raise the claim for 8 years.

Of course the state has not yet had reason to refute these claims Williams makes because at the time Judge Croake passed upon them and dismissed the petition without hearing this court had not yet announced its opinion in *United States ex rel. Ross* v. *McMann* and related cases. I point out the insubstantiality of the claims not only to emphasize that, in my opinion, there was no need to make any answer to Williams' claims, but also because it seems to me that even under the holding of the majority, and what the majority members of this court said in *United States ex rel. Ross* v. *McMann,* it might still be possible for the state to present record evidence of such nature that the petition could be acted upon and dismissed without the calling of any witnesses.

I also refer to these glaring defects in Williams' petition to emphasize the point I made in my dissenting opinion in *Ross* that New York State courts, and subsequently our own federal courts, will be overburdened by the requirement that they spend valuable time in listening to insubstantial claims regarding events so far in the past that memories and records will be so imperfect and incomplete that the court can do little but speculate. Undoubtedly trial judges who must listen to such claims will be able, readily and speedily in the great majority of cases, to determine that the claims are incredible and almost entirely an exercise in imagination prompted by the reading of opinions, such as those in *Ross,* which suggest facts justifying relief.

I would affirm the judgment of the district court which denied the petition without a hearing.

SUPREME COURT, U. S.

FILED

DEC 1 1969

JOHN F. DAVIS, CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 153

DANIEL McMANN, Warden of Clinton Prison, Dannemora, New York, and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

against

WILBERT ROSS, WILLIE RICHARDSON, FOSTER DASH and and McKINLEY WILLIAMS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Filed May 24, 1969
Certiorari Granted October 13, 1969

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Wilbert Ross—Docket Entries.

(United States District Court, Eastern District of New York, Docket No. 67 C 500)

5/25/67	Petition filed for a Writ of Habeas Corpus.
5/25/67	By Bruchhausen, J. Memorandum and Order filed. The Court concludes that the relator's motion lacks merit and that the petition should be dismissed. The papers will be filed without payment of fees. (See Memorandum and Order).
5/25/67	A copy of the memorandum and order was on this day mailed to the Warden at Dannemora, for delivery to the relator, by the Secretary to Judge Bruchhausen.
8/23/67	Letter of Clerk of Court, U.S.C.A., filed re papers, etc.
8/24/67	Record mailed to Clerk, U.S.C.A., S.D.N.Y., per letter dated 8/18/67.
9/ 1/67	Acknowledgment of Clerk of Court, U.S.C.A. (Post card) re receipt of papers sent them, etc.
2/27/68	Copy of Order, U.S.C.A., filed granting motion for a certificate of probable cause to the Relator herein.
2/27/68	Letter of U.S.C.A., filed re certification of the original papers which had been sent them, etc.

Petition for Writ of Habeas Corpus.

STATE OF NEW YORK)
COUNTY OF CLINTON) ss.:

WILBERT Ross, being duly sworn, deposes and says:

1. That the same is his true name, that he is over the age of twenty-one years and of sound mind, a citizen of the United States by birth, and the party identified above as the relator-petitioner (hereinafter relator).

2. That he is presently confined at a place known to him as Clinton Prison, in the Village of Dannemora, County of Clinton, established under the laws of the State of New York.

3. That the person who so confines him is one Daniel McMann, upon information and belief Warden of Clinton Prison (hereinafter respondent), upon the authority of a certain commitment, upon information and belief numbered Clinton Prison No. 32974, which, upon information and belief, rests upon a certain Judgment entered in the Supreme Court of the State of New York, County of Kings (sub nom. County Court, Kings), upon the 14th day of March, 1955, ordering the confinement of relator for a term of 45 years to life upon his conviction by plea of the felony of second degree murder, on the 4th day of February, 1955.

4. That the commitment aforesaid is void and invalid, in that the Judgment upon which it rests is infirm, owing to the fact that relator's plea of guilty was induced by threats as detailed in his Supplementary Affidavit; and furtherly because the existence of a certain written inculpatory statement (hereinafter *confession*), which was given

after the uttering of threats by police officials, served to aggravate the force of the threats which induced the plea, in violation of relator's due process rights under the Fifth and Fourteenth Amendments of the Constitution of the United States of America.

5. That relator is not detained by virtue of a Mandate, Process or Final Order which reserves to any Judge or Court of the United States the exclusive power to order his relase.

6. That his petition is not made in contravention of traditional tests of Federal-State comity.

7. That no previous application has been made for a Writ of Habeas Corpus in any Court of the Judiciary System of the United States.

WHEREFORE, relator prays that the Writ issue and a hearing be held, and upon the facts and the law the Writ be sustained; and that this Court do all else that to it may seem both Meet and Just.

Respectfully submitted,

/s/ WILBERT ROSS,
Relator-Petitioner,
P. O. Box B No. 32974,
Dannemora, New York 12929.

(Sworn to by Wilbert Ross, May 18, 1967.)

Supplementary Affidavit of Wilbert Ross.

STATE OF NEW YORK, }
COUNTY OF CLINTON, } ss.:

WILBERT ROSS, Being duly sworn, deposes and says that as relator in the Cause before this Honorable Court, he makes this Supplementary Affidavit in amplification of the allegations set forth in the Petition for Writ of Habeas Corpus (4), as follows:

1. Sometime during the month of May, 1954, I was confined in the Raymond Street Jail at 125 Ashland Place in the Borough of Brooklyn, County of Kings, upon a charge of Attempted Grand Larceny; and on a day of that month, I was taken from my cell and delivered into the custody of two persons held out to me to be detectives, who told me that the District Attorney wished to see me. I recall having signed a paper of some kind at the Jail which, to my best recollection, was some kind of printed form.

2. The detectives drove me to the Court House located at Smith and Schermerhorn Streets. It is possible that some conversation took place in the auto, but it would have been of a trite nature; no indication was given as to the purpose for which the District Attorney wished to see me. At the Court House I was led to an office and told to sit and wait; the time, as closely as I can recall, was about 8:30 a.m. or 9:00 a.m. There was a man in the room—not one of the two detectives—but his conversation, if any at all, did not touch upon the purpose of my being there.

3. After about a half-hour a fourth man entered, identified himself as "McCabe, Chief of Detectives," and asked if I was Wilbert Ross; I told him I was, whereupon he placed a collection of papers of some kind on the desk and said something to the effect of "It looks like you've gotten yourself in a little trouble," and I answered something like, "Yes, I guess I have." He then said that if I would help him, he would help me. I asked him what he meant and he told me that he meant I should tell him all about the murder I had committed a month and a half before. This was the first time that any indication was given to me that I was suspected of the commission of a murder. I answered that I knew nothing about any murder, whereupon he declared that he had proof that I had committed the murder, that he had my accomplice in this murder in custody, and that this accomplice had confessed to his own part in the murder which, according to the accomplice, had been compelled by my having forced him at gunpoint to accompany me and take part in the murder under threat of death to his wife.

4. McCabe allowed that he knew well enough that this business about my having forced the accomplice at gunpoint was a lie; unless I told him, however, what had actually happened, he would see to it that I went to the electric chair for murder and kidnapping. I insisted to McCabe that I knew nothing about any murder.

5. In the course of my conversation with McCabe, a number of additional detectives came into the office intermittently, both singly and in pairs. Their entrance had been so unobtrusive that I was astonished to discover that at one time there were fourteen in all. They did not directly speak to me, or even to one another audibly; they just sat there, or stood around, walked, stared at me,

looked at one another and exchanged nods, without addressing any questions to me. One, however, removed his coat and turned his back to me with his service revolver sticking out of his back pocket. I remember that I was constantly distracted by his proximity, but he never spoke a word to me.

6. Thereupon, McCabe told me that he would let me hear and be convinced from the lips of this accomplice. I was taken from the room by three of the detectives and observed another person being led in by other detectives. In an office to which they took me there was an inter-office communication device connected with the office where I had been earlier with McCabe and the detectives. After about ten minutes the device was switched on to enable me to hear what was being said in the room. The voice was that of Robert Jenkins, and just as McCabe had said he would, he was accusing me to the police of having forced him at gunpoint to participate in the murder, and of having threatened his life and that of his wife. His account agreed in every important respect with what McCabe had told me in advance that Jenkins would testify at my trial.

7. After some minutes I was brought back to the office where McCabe was. Jenkins was no longer there. McCabe asked me if I had heard everything, and I told him I had but that it was not true. He laughed and said something on the order of, "Hell, I know it isn't and you know it isn't, and he knows it isn't; but will a jury know it isn't?" And he went on: "They're going to believe him, and deep down inside you know they willl, and because they will, they'll convict you, Wilbert, and you'll go to the chair. So if you think you have the truth on your side, then you have money you can't ever spend. Now you think about that, Wilbert, and you think hard and fast. Because

you've got to decide now. You're facing the electric chair, Wilbert, and I'm the only person who can help you. You know that, don't you?" These are not his exact words, of course, but they are substantially the words he spoke. I did not answer his question, and he half-rose and leaned across the desk and shouted, "Well, dammit, don't you?" and I sort of shrugged. He came around to the front of the desk and said something like, "Wilbert, I don't have time to waste with you". He looked at his watch and said he had to see the District Attorney in an hour, and that if I didn't give him my story to tell the District Attorney, he would have to give him Jenkins' story and he would be finished with the matter. For himself, he did not really want me to go to the electric chair, but he had not gotten to be Chief of Detectives by going to bat for people who refused to give him any cooperation. He had to have a statement from me or it would be just what Jenkins said and while he was not a lawyer, he guessed that was more than enough for the District Attorney.

8. I told McCabe I did not know what to do, that I had a lawyer from my case, Jerome Karp, Esquire, and that I would want to talk to him first. McCabe said that was completely out of the question, there was no time for me to get advice from lawyers and ministers and brothers and sisters. He told me it was my life and if I was any kind of man I would recognize that only I could save it and they couldn't do it for me. He said I was in man-sized trouble and had to make a man's decision. "Are you going to be a man and help yourself, or are you going to lose the last opportunity you'll ever have to stay alive simply because you're not grown-up enough to think and act for yourself?" he asked me. I then gave a statement to the police which was reduced to writing, and which I signed.

9. I was then taken to the home of acquaintances where the detectives conducted a search for a gun. Failing to find it, they took me back to the office, brought me something to eat and gave me some books to read. They then took me back to the Raymond Street Jail. I cannot say with absolute certainty whether the officers who took me back were the same as those who had taken me from the Jail; I remember one of the detectives said I had nothing to worry about because McCabe could be trusted to keep his word; I recall no other conversation.

10. Two days later I was again taken from Raymond Street Jail by detectives. I do not at this date recall if they were the same detectives, or if the same procedure was followed in my removal; I do not recall having signed any paper. They told me they had not yet found the gun and that McCabe was very upset over that, that it would be too bad if I were to antagonize him at this stage because he had really done his best for me with the District Attorney and the latter had agreed to go along with McCabe in the matter if I continued to cooperate. I then told them where to find the gun and they went and got it.

11. After finding the gun, the detectives took me on the same day to an assistant district attorney. I would guess that he probably told me his name when he told me he was an assistant district attorney, but I do not remember his name, if I ever knew it. He told me that I had helped myself by cooperating with McCabe but that the final decision in the case would be made by him and he expected the same cooperation I had given to McCabe. He questioned me about the murder and had the questions and answers stenographically recorded by a man present at the time. The questions and replies were transcribed and typewritten for my signature. I signed it. I was not advised

that I could consult with an attorney or remain silent; I did not, as earlier, express a wish to consult with an attorney. I was taken back to Raymond Street Jail. In September, 1954 I was sentenced to a term of two to three years in state prison on the pending charge of attempted grand larceny and was taken to Sing Sing Prison.

12. In October, 1954 I was removed from Sing Sing Prison and taken back to Raymond Street Jail, then arraigned in County Court, Kings County, to an indictment charging first degree murder. About one month later I was visited at the Jail by a man who identified himself as Harvey Strelzin and told me that he had been assigned by the Court to be my attorney. To my best recollection he did not then question me about the charge but asked me to tell him everything I could remember about the changes I had undergone in my life—childhood, school, home life, military service, anything that came to mind. We must have spoken for nearly an hour.

13. Sometime later he visited me again; I would say it was five or six weeks afterward, but I cannot be certain with greater specificity. I asked him then "to get my confession back". I recall those to have been my exact words. I meant that I wanted to repudiate the confession and have it suppressed. I spoke in the belief that it could be done in some way. He told me that that was completely out of the question and that at any rate the District Attorney had the gun, that nothing had changed, that Jenkins would tell his story to the jury, and that his testimony, backed up by the confession and the gun, would be enough to make "a jury of twelve cousins" convict me and send me to the electric chair. He told me that he would "get the first possible break" for me from the District Attorney, but that I "would be dead by the Fourth of July" if I risked a trial.

Supplemental Affidavit of Wilbert Ross.

14. When I was brought to Court in February of 1955, Mr. Strelzin came in to see me while I was in the detention cell. I asked him again about repudiating and suppressing my confession; this seemed to exasperate him because he spoke sharply about having gone all through that before and that I had better listen to him because *he* was my lawyer and not those convicts in Raymond Street who would all be in Sing Sing in six months with all the law they knew. I told him I had not asked him on the basis of anything anyone had told me. He seemed to grow calmer at that. He told me he had spoken to the District Attorney, who was willing to allow me to plead to second degree murder, and I would get twenty years to life; he said it was an "or else" offer, that I knew the evidence the District Attorney could present against me. He said that things were no better than before and, if anything, were much worse; the District Attorney had the confession, the gun, and Jenkins, who could be expected to tell any story to help himself. If I insisted on going to trial, well, he was my lawyer and would do what he could, though that couldn't amount to very much because "there isn't a pair in the world to beat four aces." Twenty to life was a long time, he wasn't going to argue that it wasn't; but it had to be better than the electric chair.

15. I went out into the Courtroom and pleaded guilty to second degree murder.

16. Such events as took place and are not recorded here are omitted in the belief that they are not relevant; and the failure to have included a detail is not intended to deny its existence or occurrence except where it might conflict in any material aspect with any event narrated here, in which case the omission is intended to deny such existence or occurrence.

17. The foregoing represents a true, accurate, and substantially complete account of the events treated, within the memory of the deponent.

Respectfully submitted,

/s/ Wilbert Ross,
WILBERT Ross, Deponent,
Box B, No. 32974,
Dannemora, N. Y. 12929.

(Sworn to by Wilbert Ross on May 18, 1967.)

Memorandum of Law.

A.

* * *

II. *History*

Relator moved the Supreme Court of the State of New York, County of Kings, for a writ of error *coram nobis* in a petition verified 23 March 1965, to vacate a Judgment entered in that Court (sub nom. County Court, Kings County) on 14 March 1955 pursuant to a conviction by plea of guilty under Indictment No. 1459/1954 of the felony of second degree murder, whereby he was sentenced to a term of 45 years to life imprisonment, which motion and petition were denied without a hearing by Order made on 21 May 1965 (BARSHAY, J.). Subsequent motion for reargument dated 10 June 1965 was granted and the original decision adhered to by Order made on 15 September 1965 (BARSHAY, J.). The Order was appealed in the Second Judicial Department of the Appellate Division of the Supreme Court of the State of New York, which Court unanimously affirmed the Order below on 5 July 1966. An application for leave to appeal in the New York Court of Appeals pursuant to C. Cr. Pro. § 520 was denied (FULD, Ch. J., 1-10-67). No appeal was taken directly from the Judgment. No application was made in the United States Supreme Court for *certiorari*. Relator has never before sought *habeas corpus* in a Court of the Judiciary System of the United States.

* * *

DEC. 1 1969
JOHN F. DAVIS, CLERK

WHEREFORE, For all the reasons herein argued, the Writ should issue.

Respectfully submitted,

/s/ WILBERT ROSS,
Relator-Petitioner,
No. 32974,
P. O. Box B,
Dannemora, New York 12929.

(Sworn to by Wilbert Ross on May 18, 1967.)

Memorandum and Order.

The relator, now in State custody, seeks a writ of habeas corpus.

Pertinent Allegations in the Petition

In May, 1954, while in State custody, the relator was taken to the office of the District Attorney and questioned about the commission of a murder; he was coerced into signing a statement, confessing the crime; his request to be permitted to consult with his attorney was refused and he was not advised of his right to remain silent;

In October, 1954, he was arraigned on an indictment, charging him with the commission of first degree murder;

Five or six weeks later, he requested his court appointed lawyer, Mr. Harvey Strelzin, to seek the return of the confession; Strelzin urged that no such action be taken; if he persisted in demanding a trial, Mr. Jenkins, a witness for the People would testify against him and he would get the chair;

In February, 1955, he was brought into court, represented by counsel, and informed that the District Attorney was willing to accept a plea to second degree murder and that that his sentence would be twenty years to life; he thereupon pleaded guilty to that charge;

March 14, 1955, judgment of conviction was entered, including a sentence of forty-five years to life;

March 23, 1965 (ten years later) he verified a petition for coram nobis, seeking the vacating of the judgment of conviction;

May 21, 1965, the petition was denied without a hearing;

May 24, 1965, the order thereon was entered;

June 10, 1965, reargument of the motion was granted;

Sept. 15, 1965, the original decision was adhered to;

July 5, 1966, The Appellate Division of the Supreme Court, Second Department, affirmed the said order.

Jan. 10, 1967, leave to appeal to the State Court of Appeals was denied;

No appeal was taken directly from the judgment of conviction.

THE GROUND URGED IN SUPPORT OF THE PRESENT PETITION

That the relator's plea of guilty was involuntary and induced by threats.

A PLEA OF GUILTY CONSTITUTES A WAIVER OF ALL NON-JURISDICTIONAL DEFECTS IN ANY PRIOR STAGE OF PROCEEDINGS AGAINST A DEFENDANT, INCLUDING DEFECTS IN A PRELIMINARY HEARING

In United States ex rel. Gleen v. McMann, 349 F. 2d 1018, 1019, the court stated:

> "Appellant claims that his plea of guilty was unconstitutionally coerced by the existence of a confession that had been wrung from him involuntarily. * * *
>
> "A voluntary guilty plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings against him. * * *
>
> "Petitioner's motions are denied. The respondent's cross-motion to dismiss the appeal is granted."

Petitioner Glenn's application to the Supreme Court of the United States for a writ of certiorari was denied. See United States ex rel. Glenn v. McMann, 383 U. S. 915.

People v. Nicholson, 11 N. Y. 2d 1067, decided July 6, 1962, cited and relied upon by the relator fails to support his position. The court therein, at page 1068, said:

> "A defendant who has knowingly and voluntarily pleaded guilty may not thereafter attack the judgment of conviction entered thereon by coram nobis or other post-conviction remedy on the ground that he had been coerced into making a confession and that the existence of such coerced confession induced him to enter the plea of guilty. If a defendant desires to contest the voluntariness of his confession, he must do so by pleading not guilty and then raising the point upon the trial; he may not plead guilty and then, years later, at a time when the prosecution is perhaps unable to prove its case, assert this alleged constitutional violation. The issue as to whether the confession was illegally obtained is waived by the guilty plea."

The Nicholson case, *supra,* was cited with approval in People v. Dash, 16 N. Y. 2d 493, decided April 22, 1965.

The Court concludes that the relator's motion lacks merit and that the petition should be dismissed. The papers will be filed without payment of fees.

A copy hereof is being mailed to the respondent for delivery to the relator.

WALTER BRUCHHAUSEN,
United States District Judge.

Application for a Certificate of Probable Cause.

WILBERT ROSS, duly sworn deposes and says: That he is the appellant in the above entitled cause and does make this application for a certificate of probable cause. The following action has been taken thus for:

A judgment of conviction was entered against appellant in the Supreme Court of Kings County on the 14th day of March, 1955, ordering the confinement of the relator for a term of 45 years to life upon his conviction by plea of the felony of second degree murder, on the 4th day of February 1955.

On March 23, 1965 a petition for coram nobis, seeking to vacate the judgment of conviction; on May 21, 1965 the petition was denied without a hearing; on June 14, 1965 reargument of the motion was granted; on September 15, 1965 the original decision was adhered to; on July 5, 1966 the Appellate Division of the Supreme Court, Second Department, affirmed the said order.

January 10, 1967, leave to appeal to the State Court of Appeals was denied;

No appeal was taken directly from the judgment of conviction.

On May 18, 1967, a petition for writ of habeas corpus was sent to the United States District Court, Eastern District of New York; on May 25, 1967, the petition was denied;

(WALTER BRUCHHAUSEN, U.S.D.J.)

On June 16, 1967, an application for a certificate of probable cause was sent to Judge Bruchhausen;

On June 19, 1967, the application was denied.

Appellant requests that this court review the erroneous ruling of the District Court in that his rights under the

Fifth and Fourteenth amendments of the constitution of the United States were violated as follows:

1. Appellant's plea of guilty entered under the force of threats was involuntary and must be set aside as violating due process.

Appellant's plea of guilty, upon which his conviction rests was not made voluntary, but rather was induced by threats made to him during his interrogation.

Where a plea of guilty has been entered as the result of coercion by the court or officers of the court, the judgment of conviction based on that plea must be vacated. *People ex rel. Lyons* v. *Goldstein,* 290 N. Y. 10 (1943); *People* v. *Richetti,* 302 N. Y. 290. This coercion can consist of threats or promises made to a defendant. *People* v. *Picciotti,* 4 N. Y. 2d 340 (1958); *People* v. *Emmons,* 17 A. D. 2d 1029 (4th Dept. 1962).

2. Appellant was denied the representation of counsel.

During the interrogation by the police and before the appellant made a confession, he asked to be represented by counsel, but this request was denied.

The State of New York, having formerly instituted criminal proceedings against the defendant in a court having jurisdictoin of the crime charged, even though the defendant has not been arraigned on the complaint, it was precluded from questioning him thereafter either through the police or the district attorney in the absence of his counsel, and any admission obtained from him under such circumstances are constitutionally inadmissible. (*People* v.. *Gregory,* N.Y.L.J. March 19, 1964, p. 17, col. 7) (Shapiro, J.).

Application for a Certificate of Probable Cause.

D.C.N.C. 1963.

Where the accused was indicted for capital crime, he was constitutionally entitled to counsel at every stage of proceeding, terminating in his guilty plea to noncapital Felony—*Anderson* v. *State of North Carolina,* 221 F. Supp. 930.

Leave to proceed in forma pauperis was denied by the District Court and petition for same accompanies this application.

WHEREFORE, appellant prays that this application be granted and the certificate of probable cause issue and an appeal to this court be allowed.

Respectfully submitted,

WILBERT ROSS,
Appellant-Petitioner.

WILBERT ROSS,
Post Office Box B,
Dannemora, N. Y. 12929.

United States Court of Appeals Order of Reversal.

UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of February one thousand nine hundred and sixty-nine.

Present: Hon. J. EDWARD LUMBARD,
Chief Judge,
Hon. STERRY R. WATERMAN,
Hon. LEONARD P. MOORE,
Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH,
Hon. IRVING R. KAUFMAN,
Hon. PAUL R. HAYS,
Hon. ROBERT P. ANDERSON,
Hon. WILFRED FEINBERG,
Circuit Judges.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings not inconsistent with the opinion of this Court with costs to be taxed against the appellee.

A. DANIEL FUSARO,
Clerk.

Docket Entries.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES OF AMERICA, ex rel. FOSTER DASH,
Relator,

v.

HAROLD W. FOLLETTE, as Warden of Green Haven Prison, Stormville, New York,
Respondent.

Date	*Proceedings*
Oct. 14-65	Filed petition for writ of habeas corpus & order granting the filing thereof without prepayment of fees, etc., application for writ Ret. 10-25-65, Rm. 318—Cannella, J.
Oct. 25-65	Before Cannella, J.—petition submitted—decision reserved
Feb. 3-66	Filed respondent's notice of appearance
Feb. 3-66	Filed petitioner's reply affdvt. with proof of service
Feb. 3-66	Filed affdvt. of Mortimer Sattler in opposition
Feb. 3-66	Filed Opinion #32,035.—Petitioner's application for a writ of habeas corpus is denied. So ordered—Cannella, J.—mailed notice
Mar. 16-66	Filed petitioner's notice of motion for a certificate of probable cause
Mar. 16-66	Filed petitioner's letter dated 2-25-66
Mar. 16-66	Filed memo endorsed on motion—Leave to appeal in forma pauperis and a certificate of probable cause are granted. The Legal Aid Society is assigned as counsel—Cannella, J.—mailed notice
Mar. 16-66	Filed petitioner notice of appeal in forma pauperis—mailed copy to Atty. Gen'l State of NY

Petition for Writ of Habeas Corpus.

STATE OF NEW YORK)
COUNTY OF DUTCHESS) ss.:

The petition of FOSTER DASH, confined at Green Haven Prison, Stormville, New York, herein respectfully shows:

That the said Foster Dash (hereinafter to be known as relator); the person on whose behalf this writ is applied for is now imprisoned and restrained of his liberty.

That the said relator is now confined at Green Haven Prison, located at Stormville, New York, in the County of Dutchess, and the officer or person by whom he is so imprisoned is, Howard W. Follette, Warden of said Green Haven Prison.

That this relator has not been committed and is not detained by virtue of any judgment, decree, final order or mandate issued by a court or judge of the United States, in a case where such court or judge has exclusive jurisdiction under the laws of the United States; nor have acquired exclusive jurisdiction by the commencement of legal proceeding in such court, or by virtue of a final judgment or decree of a competent tribunal made in a special proceeding, entitled for any cause, except to punish him for contempt; or by virtue of any exclusive or process issued upon judgment, decree or final order.

That the cause or pretense of such imprisonment and restraint according to the best knowledge and belief of your relator, is a certain commitment warrant, order or process issued by the Honorable Judge Lyman, of the then County Court of Bronx County (see indictment No. 215-1959).

That relator brings this petition before this Honorable Court under the Civil Rights Act, 42 U.S.C.A. Section 1981; Title 28 U.S.C. 1443; the Judiciary Act of February 5, 1867, c. 28, Section 1, 14 Stat. 385-386; Title 28 U.S.C. Section 2241 (c), and 3; Title 28 U.S.C. 2243 and Title 28 U.S.C. 2254.

THE INDICTMENT

That on February 24, 1959, the Grand Jury of Bronx County handed down an indictment with the number 215/1959, entitled "People of the State of New York v. Joseph E. Fields, John Doe, Richard Roe, Peter Loe, charging them with acting together and in concert in committing the crime of Robbery, First Degree.

That on February 25, 1959, the relator, Foster Dash, was arrested and subsequently the above-number indictment was amended to substitute the name "Foster Dash" for the above-cited fictitious name "John Doe".

On April 6, 1959, relator pleaded guilty to the crime of robbery in the second degree and the judgment of conviction was entered on August 3, 1959, with a sentence thereby being imposed of not less than eight (8) years and for no more than twelve (12) years as a second felony offender.

STATEMENT OF PRIOR PROCEEDINGS

That on February 26, 1963, an order was entered denying this relator motion for a writ of error coram nobis (submitted on January 25, 1963), without opinion (Greenberg, J.).

On or about the 29 day of September, 1964, the Appellate Division for the First Judicial Department of the New York State Supreme Court, affirmed the lower court decision.

Leave to Appeal to the New York Court of Appeals was granted, pursuant to Section 520 of the Code of Criminal Procedure, and thereafter on or about the 26 day of April 1965, the action of the lower courts was affirmed (with two (2) justices thereof dissenting). (N.Y.L.J., Mon. April 26, 1965, p. 16, col. 1.)

FEDERAL STATUTES INVOLVED

UNITED STATES CONSTITUTION:

Sixth Amendment.

UNITED STATES CONSTITUTION:

Fourteenth Amendment.

"No states shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor allow any person within its jurisdiction the equal protection of law".

STATEMENT

On or about the 26th day of February, 1959, relator was arrested in New York City by police officers without there being probable cause. When relator inquired of the officers the cause of his arrest he was handcuffed, assaulted by the arresting officers and forcibly taken to the police station.

At the police station, relator was taken to a room, and was handcuffed to a chair. After the elapse of several minutes, a group of other police officers entered the room, and began to beat and question relator about various crimes allegedly committed in New York County. Relator denied having knowledge of any crime, and thereupon, requested counsel to protect him in his constitutional rights.

Relator request for the assistant of counsel was denied, and he was thereupon taken to a police station in the County of the Bronx, where he was again beaten and questioned in incessant relays in an effort to have him inculpate himself for crimes that allegedly had taken place in the Bronx County area. The relator reiterated that he was in-

nocent of any crime, that he be allowed to contact his family, so that he would then have counsel, to protect his constitutional rights. This request was again denied. The relator asked to be confronted with the witnesses against him (if there was any such witnesses), but this too was to no avail. The police officers persistently tried to extort a confession from this relator, by utilizing methods known as the "third degree". He was held incommunicado for 7½ hours; he was then taken to the office of the District Attorney of Bronx County.

Despite the fact that relator was denied his request for the aid of counsel, at no time did he make any voluntary statements to the police or the District Attorney. At the District Attorney's office, relator was interrogated at length about various crimes that allegedly had taken place throughout New York City. Relator made a direct request to the Assistant District Attorney for the aid of counsel and was *flatly denied*. He was informed that he *had already been indicted*, and that he could have counsel soon enough; and if he did not cooperate with them, the Assistant District Attorney would then fix it so that every crime that was then unsolved would be "yours" (relator), and that the same office would "clear the books" with him, for he was a second felony offender. Relator then involuntarily signed a prefabricated confession to a crime that he did not *commit*.

On March 16, 1959, relator appeared for pleading upon the robbery indictment, whereat the District Attorney stated that he was only offering a plea to robbery in the first degree and that such plea would be sufficient for this relator. Defense counsel advised relator that he had better interpose a plea of guilty to the indictment due to the confession signed by this relator. He further advised relator that there was nothing that he could do for him; and that the best that could be done was for the relator to throw

himself on the mercy of the court. To this relator reminded counsel of the highly improper methods had in the District Attorney's office, and that he wanted to go to trial, for he was not guilty of any crime. However, counsel reiterated, that there was nothing he could do for this relator. The matter was then postponed until April 1, 1959.

On April 1, 1959, relator appeared once again for pleading upon the said indictment, wherefore, the trial Judge stated that if the relator decided to go to trial, and then did not prevail therein, the Court would then impose the maximum penalty upon him; the Court further characterized the crime relator was charged with, as being next to murder and that he would give this relator further time to think it over. The proceedings were then postponed until April 6, 1959.

Due to the undue pressure which was placed upon this relator, as well as the alleged co-defendant, on April 6, 1959, relator involuntarily entered a plea of guilty to the crime of robbery in the second degree. Prior to the said plea, the Court coerced relator into stating that he had participated in the said crime, while the alleged co-defendant was compelled to do like-wise.

Rudolph Waterman, Albert Devine, the others that was indicted under fictitious names on the same indictment with this relator went to trial and had their convictions reversed by the Court of Appeals of the State of New York. See *People v. Waterman*, 9 N. Y. 561 (1961).

Argument

Relator alleged in his coram nobis petition that on February 24, 1959, a "John Doe" indictment charging him with robbery in the first degree was returned against him; on February 25, 1959 he was arrested, beaten; and that he

requested the assistant of counsel which was denied and he was again beaten. On February 26, after an extensive beating and a prolonged interrogation relator signed a statement in "absence of counsel", confessing to a crime that he was not guilty of. Relator wasn't assigned counsel until February 27, 1959. On March 16, he was advised by this Court appointed counsel that he did not "stand a chance due to the alleged confession signed" by this relator, and on the basis of this coupled with the threat from the trial court that if relator went to trial and was found guilty the maximum sentence would be imposed on him (relator was then a second felony offender thereby facing some 60 years or the rest of his life in prison), relator pleaded guilty. Nevertheless, the courts of the State of New York summarily denied his coram nobis motion without affording relator a hearing and the opportunity of establishing the vital relationship between the alleged confession and the denial of counsel, and the relationship of the threat of the trial court along with the denial of counsel and the alleged confession that was signed by relator, but of a crime that relator was not guilty of, despite the fact that such a claim, if true, is unequivocally a violation of relator rights as guaranteed by the Sixth and the Fourteenth Amendments to the Constitution of the United States.

POINT I

RELATOR WAS ENTITLED TO THE ASSISTANT OF COUNSEL IMMEDIATELY AFTER THE INDICTMENT WAS RETURNED AGAINST HIM AND WHEN HE WAS ARRESTED ILLEGALLY.

This relator was arrested after an indictment was returned against him by the Bronx County Grand Jury, although the arresting officers acted without warrant nor with probable cause. The relator was then beaten in two

police station houses and then taken to the District Attorney office of Bronx County. He requested counsel at every opportunity that was afforded him. In spite of this request or requests, to the police officers and the District Attorney of Bronx County, he was denied. The probabilities are that if relator had been given the assistant of counsel when he was entitled to it, he would not have signed the alleged confession to a crime that he was not guilty of, nor would the court assigned counsel advised him to enter a plea of guilty to the crime that he was not guilty of, had the counsel not known of the fact that relator was to be confronted with this alleged confession at the time of the trial.

Relator's allegations, which are supported by the record, therefore, indicate that he was deprived of his right to counsel at a crucial stage of the proceedings against him. All his problems stem from the deprivation of his right to counsel. *Gideon* v. *Wainwright*, 372 U. S. 335 (1962). Nor can there be any doubts that if the allegations are true relator was deprived of counsel at a critical stage of the proceedings against him. *Escobedo* v. *Illinois*, 378 U. S. 478, *Massiah* v. *United States*, 377 U. S. 201 (1964).

In the instant case, a "John Doe" indictment had already been returned against relator. Relator had the right to counsel immediately upon his arrest. Moreover, under *Escobedo*, supra, this relator was entitled to counsel simply because when:

> ". . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the

police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistant of Counsel' in violation of the Sixth Amendment to the constitution . . ."

Relator's was not only denied the "Assistant of Counsel" by the police officers. He made this request directly to the District Attorney of Bronx County, but of course, this request was also denied by this high prosecuting officer. For the Supreme Court of the United States also has recognized that "history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence . . ." *Haynes* v. *Washington*, 373 U. S. 503, 519.

For after this relator has signed the alleged confession in the office of the District Attorney of Bronx County, after his request for counsel had been denied, there was then no need to deny him the right of counsel. For "One can imagine a cynical prosecutor saying: Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial". *Ex parte Sullivan*, 107 F. Supp. 514, 517-518.

The futility of relator's position is more clearly seen when this Court considers the fact, that the only choice remaining to him—beside the entry of the plea of guilty to a crime that he had not committed—was to proceed to trial in the hope of challenging the admissibility of the alleged coerced confession. For it was only in the case of *Jackson* v. *Denno* (32 U.S.L.W. 4620 (1964), decided by the United States Supreme Court June 22, 1964), that the Court recognized the insoluble plight of a defendant in New York, faced with the decision whether to challenge the admissibility of a confession, had in violation of the United States Constitution. Relator had no such remedy when he was faced with this situation.

Relator's is entitled to the hearing that he have never had in the New York State Court, under the authorities of *Townsend* v. *Sain,* 372 U. S. 293, 310 and *Fay* v. *Noia,* 372 U. S. 391.

POINT II

WHERE THE COURT INDUCED THE RELATOR TO BARGIN AWAY HIS LIBERTY THROUGH COERCION THAT THE COURT PRACTICED ON THE RELATOR:

This relator submitted a motion for a writ of error coram nobis which stated among other things that the trial judge (Lyman, J.) threatened him with a maximum sentence, if relator proceeded to trial and was found guity. A maximum sentence that could have been imposed on this relator was a term of 60 years.

Here we are faced with the fact, that this statement of the trial court was not made on the open record. But it was made directly to this relator and for this relator consideration.

A Judge has always been held to the highest standards of morality and conduct because of the nature of his profession as well as the fact that he is the highest officer of the setting court.

This is not the first case that has come to this District Court, concerning this type situation. For relator have only to call to this Court attention the case of *United States* v. *Tateo,* 214 F. Supp. 560. There as here, the trial court informed the defendant that if he continued trial that a sentence would be imposed on him that would enable the Government to keep the defendant behind bars for the rest of his life. The defendant, Tateo, then entered a plea of guilty.

In a later proceeding under 28 U.S.C. 2255, another district judge (Judge Weinfeld) granted Tateo motion to set

aside the judgment of conviction and for a new trial, determining that the cumulative impact of the trial testimony, the trial judge's expressed views on punishment, and the strong advice given by his counsel rendered it doubtful that Tateo possessed the freedom of will necessary for a voluntary plea of guilty.

There can be no doubt that, if the allegations contained in this relator's motion and affidavit are true, he is entitled to have his plea and sentence vacated. A guilty plea, if induced by promises or *threats* which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to a collateral attack. See *Walker* v. *Johnson,* 312 U. S. 275; Waley v. Johnson, 316 U. S. 101. Out of just consideration for a person accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. *Kercheval* v. *United States,* 274 U. S. 220, 223.

The threats made by the court was not a matter of open record. But how often will a court go on record, when he makes a threat to a helpless defendant? But the people of the state of New York has denied this relator a hearing on this issue. Relator's is now entitled to a hearing on the allegations in this Federal District Court. *Machibroda* v. *United States,* 368 U. S. 478.

Conclusion

Wherefore, upon the authorities cited herein, accordance with the provisions of the United States Constitution, relator prays that this writ of habeas corpus issue, directed to the Hon. Howard W. Follette, Warden of Green Haven Prison, Stormville, New York, or whosoever has the custody of the relator Foster Dash, commanding him to produce the body of Foster Dash at the United States Courthouse,

Petition for Writ of Habeas Corpus.

District Court, for the Southern District of New York, Foley Square, New York City, on the 18 day of October 1965, in the forenoon of that day or as soon thereafter as this relator can be heard for an order to adjudicate the questions presented herein and to determine whether this relator shall be release from custody or for an order releasing relator from custody pursuant to the powers of this Honorable Court on this writ of habeas corpus and entering final judgment thereon.

Respectfully submitted,

Foster Dash #79331
Foster Dash #79331
Drawer B
Stormville, New York

(Sworn to by Foster Dash on October 5, 1965.)

Affidavit of Mortimer Sattler in Opposition.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MORTIMER SATTLER, being duly sworn, deposes and says:

I am an Assistant Attorney General in the Office of Louis J. Lefkowitz, Attorney General of the State of New York, counsel for the respondent herein, and make this affidavit in opposition to relator's application for a writ of habeas corpus.

Relator was indicted along with three others on February 9, 1950, charged with robbery in the first degree, grand larceny and assault.

He, together with one co-defendant, pleaded guilty on April 6, 1950 to the crime of robbery in the second degree and on August 3, 1950 was sentenced as a second felony offender to a term of 8 to 16 years. On January 21, 1960 and on February 26, 1963 two separate coram nobis applications were denied by Mr. Justice Schweitzer and Mr. Justice Greenberg. The grounds raised in those proceedings are similar to those raised herein. The orders were affirmed by the Appellate Division, First Department, 21 A.D. 2d 928, and affirmed by the New York Court of Appeals, 16 N.Y. 2d 993. A copy of the brief of the District Attorney of Bronx County is annexed hereto.

Relator raises two contentions: first, that his plea of guilty was a product of a coerced confession; and second, that the plea of guilty was entered in the final count by telling him that he would get the maximum penalty if he were found guilty after trial.

As to the first contention, it has been firmly established that a voluntary plea of guilty entered on advice of counsel bars review of all non-jurisdictional defects in the proceedings against the defendant. [illegible]

v. *Reinke*, 344 F. 2d 975, 980-981 (2d Cir. 1965); *U. S. ex rel. Gleim v. McMann*, F.2d (2d Cir., decid. August 26, 1965); *People v. Nicholson*, 11 N. Y. 2d 1067.

As to the second ground, it appears that at the time that the defendant pled guilty he specifically declared that his plea was being made voluntarily and that no promises were made to him. It further appears from the opinion of the Court of Appeals (16 N. Y. 2d 994), that the prosecutor who appeared in the state court proceedings had filed an affidavit in which he stated categorically that the trial judge had never threatened the defendant, from which that court concluded that this relator had not presented a triable issue on the question of coercion.

Significant also is the fact that two of his co-defendants went to trial, were convicted, subsequently had those convictions reversed (*People v. Waterman*, 9 N. Y. 2d 561), and, I am informed, subsequently pleaded guilty to escape and were sentenced to 2½ to 5 years.

Assuming that the Court did inform the defendant as to the possibilities of sentence (such advice is not only not improper but may even be desirable) (*Waterman, U. S. ex rel. Meehle v. Fay*, 63 Civ. 742, decid. August 24, 1965; see also *U. S. ex rel. Robinson v. Fay*, 344 F. 2d 196), in the *Meehle* case, supra, Judge Palmieri noted that the transcript relating to the entry of the defendant's plea of guilty "demonstrates that defendant made an intelligent and unforced choice".

Accordingly, it is respectfully submitted that the application herein should be denied.

Sworn to by Mortimer Sattler, ... October 19, 1965

Reply Affidavit of Foster Dash.

STATE OF NEW YORK)
COUNTY OF DUTCHESS) ss.:

FOSTER DASH, being duly sworn, deposes and says:

I am the relator in the above entitled proceedings and that I make this affidavit in reply to the Attorney General's affidavit in opposition to my application for a writ of habeas corpus.

In the instant application for a writ of habeas corpus, relator raised two contentions with (1) that his plea of guilty was a product of a coerced confession and (2) that his plea of guilty was coerced by the trial Court by informing him that he would be sentenced to a maximum term of imprisonment if he (relator) was found guilty.

It is of course as the Attorney General's Affidavit in opposition states (page 2), that a voluntary plea of guilty entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings against the defendant. *U. S. v. Doyle*, 348 F. 2d 715 (2d Cir. 1965); *U. S. ex rel Bianchi v. Rundle*, 341 F. 2d 972, (cert. den. 382 U.S. 1026); *People v. Nicholson*, 11 N.Y. 2d 1067.

It appears that the United States Circuit Court of Appeals has held:

> "The issue of the defendant's guilt or innocence is not involved in an application for leave to withdraw a plea of guilty. Kercheval v. United States, 274 U.S. at p. 223, 47 S. Ct. 582, 71 L. Ed. 1001. Upon such an application a trial court is not required to try the issue of guilt or innocence. The issue for determination is whether the plea of guilty was voluntarily, advisedly, intentionally and understandingly entered or whether it was, at the time of its entry, attributable to force, fraud, fear, ignorance, inadvertence or mis-

take such as would justify the Court in concluding that it ought not be permitted to stand. *United States v. Shipani*, p. 690 of 194 F. 2d; *Rachel v. United States* (8 Cir.) 61 F. 2d 300, 302.

Moreover, it appears that in each and every instance, the Court must first determine if the plea was a voluntary act of the defendant (relator). In this case before the bar, it cannot be contended that the plea was of a voluntary nature.

There can be no doubts, that if relator's allegations are true, in that the trial court within the state of New York thereby urged him into taking the plea of guilty to a crime that he did not commit, the plea of guilty cannot now stand. *United States v. Tates*, 214 F. Supp. 360. And see *United States v. Tates*, 377 U. S. 463.

The alleged affidavit of the assistant District Attorney of Bronx County is not binding on this relator, who never has been a hearing on the issues in an open court (see dissenting opinion had in the Court of Appeals in N. Y. 2d 1963). For the issue raised by this relator requires that a hearing be had on the issues, notwithstanding the fact that the alleged co-defendants later entered a plea of guilty.

Wherefore, under the foregoing, this court should grant the relator the relief sought, or in the interest of justice a hearing to determine the truth of the applications herein and that further, the motion in opposition should in all respect be denied.

Respectfully submitted,

Foster Dutt
Foster Dutt, Jr. 0701
Dutton, II
Stormville, New York

(Sworn to by Foster Dutt on October 26, 1967.)

Decision of Cannella, J.

CANNELLA, J.

Petitioner's pro se application for a writ of habeas corpus is denied.

Petitioner was indicted together with three co-defendants for robbery in the first degree, grand larceny and assault on February 9, 1959.

On April 6, 1959, together with one co-defendant, the petitioner pleaded guilty to robbery in the second degree and was sentenced as a second offender to a term of 8 to 16 years on August 3, 1959. Two separate coram nobis applications were denied on January 29, 1963 and February 26, 1963, respectively. The grounds raised are similar to the ones raised in this petition. The orders were affirmed by the Appellate Division, First Department, 21 A D 2d 975, and affirmed by the New York Court of Appeals, 16 N Y 2d 893.

Petitioner alleges: (1) that his plea of guilty was the product of a coerced confession; (2) that his plea of guilty was coerced by the trial court by telling him he would get the maximum penalty if found guilty after trial.

In regard to the first contention, it is well settled that a voluntary plea of guilty entered on advice of counsel constitutes a waiver of all nonjurisdictional defects in any prior stage of the proceedings against the defendant. *United States ex rel. Allen v. McMann*, 349 F 2d 101, 103 (2d Cir. 1965); *United States ex rel. Santucci v. Reincke*, 344 F 2d 980, 981 (2d Cir. 1965); *United States ex rel. Bonelli v. Reincke*, 344 F 2d 977, 978 (2d Cir. 1965). Petitioner therefore cannot succeed on the basis of his first contention.

With respect to the second contention (apparently that the prosecutor in the state court proceedings filed an affidavit in which he categorically stated that the trial judge never threatened the defendant. See *People v. Beck*, 16 N Y 2d 903 (1965).

Motion for Certificate of Probable Cause

Further the transcript relating to the entry of petitioner's plea of guilty clearly indicates that the defendant made an intelligent and uncoerced choice and that no promises or threats were made to him.

So ordered.

Dated: February 2, 1966.

James M. Carter,
U.S.D.J.

Motion for Certificate of Probable Cause

State of New York
County of Monroe } ss.:

Foster Dash, plaintiff-appellant, being duly sworn, deposes and says that he makes this motion for a Certificate of Probable Cause in forma pauperis from an Order of the United States District Court, Southern District of New York, filed in the Clerk's office on February 2, 1966, denying his petition for a writ of habeas corpus, certified Oct. 4, 1965.

That the issues raised in plaintiff's petition were that, 1. his plea of guilty was involuntary and was the product of an unconstitutionally obtained confession, and 2. that he was prejudiced in that the trial court threatened him to deny the entry of said plea.

That the said hearing court denied plaintiff his constitutional rights by denying his petition stating that his plea of guilty was voluntary. (People ex rel. Hicks ex rel. McMann and U.S. ex rel. Hill v. Fay, Supra)

Motion for Certificate of Probable Cause

ex rel. Sweeton v. Brierley, 344 F. 2d 260 (2d Cir. 1965); *United States ex rel. Bracher v. Brierley*, 371 F. 2d 977 (2d Cir. 1967); and that the authorities cited by the District Court in denying plaintiff's writ were not subjected to such corrective methods after indictment and therefore are not applicable nor are they binding on plaintiff.

That it is established by the records of this case that not only was plaintiff's confession had unconstitutionally, but all of the methods leading up to the signing of said confession, as well as the confession itself, was unconstitutional. Said unconstitutional method are listed in the order as they happened.

1. The illegal search and seizure of plaintiff in violation of the 4th amendment to the U. S. Const., and *Mapp v. Ohio*, 367 U. S. 643.

2. Being transported from one police station to another, then to the district attorney's office instead of first being brought before a magistrate as required by law (Code Cr. Proc. and *People ex rel. Gow v. Bruhan*, 1891, 76 Misc. 10, 135 N. Y. S. 1101, 24 N. Y. Cr. R. 509; *People v. Wolfe*, 1905, 50 Misc. 101, 130 N. Y. S. 251, 20 N. Y. Cr. R. 1), and in violating [illegible] due process and equal protection of the laws clauses in the U. S. Constitution (5th and 14th amendments).

3. Being denied due process and equal protection (5th & 14th amendments U. S. Const.) by a 9 hour delay in arraignment for the purpose of beating and coercing a confession from plaintiff (*Mallory v. United States*, 354 U. S. 449; *People v. Kelley*, 1959, 8 N. Y. 2d 418, 208 N. Y. S. 2d 961, *People v. Hicks*, 305 N. Y. 192, N. E. 2d 780, 20 A. L. R. 1021).

Motion for Certificate of Probable Cause.

4. Being denied due process and equal protection claimed (6th & 14th amdt.) to the U. S. Constitution by extorting and coercing a confession from relator after indictment and without counsel. (See, Sec. 274, Code Cr. Proc. and *People v. Waterman*, 216 N. Y. 2d 70.

5. Denied due process and equal protection of law (5th & 14th Amdt., U. S. Const.) by the district attorney amending the "John Doe" indictment in his office by crossing out the fictitious name "John Doe" and writing plaintiff's name, Foster Dash, in its place after obtaining said confession. (See, Secs. 275-277-293, Code Cr. Proc. and *Zerega Bros. v. Parsons*, 55 F. 2d 861 and only the Court had such authority to amend indictments. *People v. Cook*, 197 A. D. 155, 188 N. Y. S. 291; aff. N. Y. 866, 142 N. E. 260; *Holdsen v. Rice*, 147 A. D. 347, 131 N. Y. S. 785. (See, also, Sec. 295-J and 295-K, Code Cr. Proc.)

6. Denied due process and equal protection of law (5th & 14th Amdt., U. S. Const.) in that plaintiff asked for and was denied the assistance of counsel throughout those illegal and unconstitutional proceedings which was violative of the 6th amendment to the U. S. Constitution and that these were critical stages of the proceedings against plaintiff. (See *Escobedo v. Illinois*, 12 L. Ed. 2d 977 (1964); *Massiah v. United States*, 377 U. S. 201 (1964); *Gideon v. Wainwright*, 372 U. S. 335 (1962).

7. For the District Court to say that plaintiffs' confessions was voluntary is wholly fictional, for it overlooks the important facts that plaintiff had already been coerced into pleading guilty in the district attorney's office after indictment and without counsel and no subsequent assignment of counsel could cure the prejudice that had already

accrued in this case. (See, *Spano* v. *New York*, 360 U. S. 315, 325-26 (1959)) (Douglas, J., concurring) and no remedy was available to him until, *Jackson* v. *Denno*, 12 L. Ed. 2d 908 (1964), which recognized the plight of a defendant in New York faced with the decision whether to challenge the admissibility of a confession, had in violation of the United States Constitution. *Id.* at 922. After all of these coercive and unconstitutional methods, one can imagine a cynical prosecutor saying:

> "Let them have the most illustrious counsel now. They cannot escape the noose. There is nothing that counsel can do for them at trial." *Ex parte Sullivan*, 107 F. Supp. 514, 517-518; *Escobedo* v. *Illinois*, *supra*.

8. The threats made by the trial court was not a matter of open record. But how often will a court go on record when it makes a threat to a helpless defendant? The affidavit of the State court prosecutor is not binding on plaintiff for the issues raised requires that a hearing be had (see, dissenting opinion in this case, N.Y.S. Court of Appeals, *People* v. *Dash*, 16 N. Y. 2d 493), and to which he is entitled, *Machibroda* v. *United States*, 368 U. S. 487; *and the legal coercion applied throughout plaintiff's case, as set forth herein, makes it very doubtful that he possessed the "freedom of will" necessary for a voluntary plea of guilty.* Judge Weinfeld in *United States* v. *Tateo*, 377 U. S. 463. (See, also, *United States* v. *Tateo*, 214 F. Supp. 560).

Conclusion

Wherefore, and in view of the above contentions plaintiff appellant being destitute, respectfully pray that he be granted a Certificate of Probable Cause by this Honorable

Court and assign counsel to protect his constitutional rights and for such other and further relief as justice requires.

Respectfully submitted,

FOSTER DASH #9731,
Plaintiff-Appellant Pro Se;
Drawer 3,
Stormville, N. Y.

(Sworn to by Foster Dash, February 23, 1966.)

Order Granting Leave to Appeal Forma Pauperis.

Leave to appeal in forma pauperis and a certificate of probable cause are granted. The Legal Aid Society is assigned as counsel.

JOHN M. CANNELLA,
U.S.D.J.

March 14, 1966.

United States Court of Appeals Order of Reversal.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of February one thousand nine hundred and sixty-nine.

Present: HON. J. EDWARD LUMBARD, Chief Judge,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFORD FEINBERG,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings not inconsistent with the opinion of this Court with costs to be taxed against the appellee.

/s/ A. DANIEL FUSARO,
Clerk.

Docket Entries.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, ex rel. McKINLEY WILLIAMS,

Relator,

against

HAROLD W. FOLLETTE, Warden of Green Haven State Prison, Stormville, New York,

Respondent.

Date	*Proceedings*
July 27-66	Filed petition for writ of habeas corpus & order granting the filing thereof without prepayment of fees, etc. application for writ Ret. 8-8-66 Rm. 318—Edelstein, J.
Aug. 22-66	Before Croake, J.—petition submitted—decision reserved
Sep 14-66	Filed petitioner's reply affdvt.
Sep 14-66	Filed petitioner's letter dated 9-5-66.
Sep 14-66	Filed petitioner's affdvt.
Sep 14-66	Filed respondent's notice of appearance.
Sep 14-66	Filed respondent's affdvt.
Sep 14-66	Filed respondent's affdvt by Amy Juviler.
Sep 14-66	Filed memorandum Opinion # 32723—petition for writ is denied—So Ordered—Croake, J
Oct. 27-66	Filed relator's application for reargument of petition for a writ of habeas corpus

Docket Entries.

Oct. 27-66	Filed memorandum Opinion # 32,878—Petition is denied—So ordered—Croake, J. mailed notice
Nov. 22-66	Filed petitioner's notice of appeal—copy to Louis J. Lefkowitz
Nov. 22-66	Filed memo endorsed on certificate of probable cause—The request of the relator in so far as he applies for a certificate of probable cause and leave to appeal in forma pauperis is granted. So ordered—Croake, —.—mailed notice

A True Copy,

JOHN J. OLEAR, JR.,
Clerk.

By E. SWANCIGER,
Deputy Clerk.

Affidavit of McKinley Williams, in Support of Petition for a Writ of Habeas Corpus.

McKinley Williams, being duly sworn according to law deposes and says:

That he is the relator-petitioner in pro se (hereafter called relator) and makes this affidavit in support of his petition for habeas corpus.

That he invokes the jurisdiction of this Honorable Court under Art. I Section IX Clause (2) of the Constitution of the United States of America; Section XIV of the Judiciary Act of September 24, 1789, I Stat. at L. 73, 81, 82, now embodied in Title XXVIII, Chapter XIV United States Code. (Holdsworth: History of the English Law Vol. IX pp. 108-25) and under the authority of the *Electoral College Case* (F. Cas. No. 4, 336), *Ex Parte Farley* (40 F. 66); and under the amplified scope of the jurisdiction of the Federal Courts as defined in *Rogers* v. *Richmond* (357 U. S. 220, 78 S. Ct. 1356 2 L. Ed. 2d 1361; App. 365 U. S. 534 81 S. Ct. 735 5 L. Ed. 2d 760); *Townsend* v. *Sain* (372 U. S. 293 83 S. Ct. 745, 9 L. Ed. 2d); *Fay* v. *Noia* (372 U. S. 391).

That he comes before this Honorable Court as he will show, without bar to this Court's consideration of the petition for habeas corpus under the rules of Federal-State comity as set forth in Title XXVIII U. S. Code annotated, Chapter Cl. III Section 2254.

Statement of Facts

Relator was charged with 5-felonies in a multi-count indictment returned by the Bronx County Grand Jury, February 6, 1956, and sentenced on a guilty plea entered March 16th, to a charge of robbery in the 2nd°, and committed April 19, 1956, to the Elmira Reception Center, Elmira, New York, for a term of 7½ to 15 years as a first offender.

Affidavit of McKinley Williams.

CHRONOLOGICAL HISTORY OF PRIOR LITIGATION

On August 28, 1964, relator made an application to the Bronx County Supreme Court, for a writ of error coram nobis, to vacate and set aside his conviction of March 16, 1956.

On September 14, 1964, an order was entered in the Bronx County Clerk's office denying the coram nobis application without a hearing.[1]

Timely notice of appeal was filed, and on December 10, 1964, the New York A. D. First Department granted leave to appeal as a poor person; thereafter on February 2, 1966, an order was entered affirming the order of the lower court.

On February 14, 1966, permission was sought to appeal to the New York Court of Appeals, the same being denied by order entered March 16, 1966 (Keating, J.).

QUESTION PRESENTED

CAN THE STATE OF NEW YORK, CONSISTENT WITH THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION, DEEM RELATOR'S GUILTY PLEA ENTERED PRIOR TO JACKSON V. DENNO[2], AN INDISPENSIBLE WAIVER OF HIS RIGHT TO CHALLENGE THE INVOLUNTARINESS OF A CONFESSION, EVEN THOUGH UNDER JACKSON V. DENNO, RELATOR AT TRIAL COULD NOT HAVE HAD A FAIR DETERMINATION ON THE ISSUE OF VOLUNTARINESS, AND WHETHER OR NOT SUCH RULING IN THE INSTANT CASE VIOLATED RELATOR'S RIGHT TO DUE PROCESS?

While the issue raised herein bears on a federal question of law under the Constitution, factual questions are similarly involved which would require a hearing to reach a determination thereon.

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[1] True copy of order and opinion of the Bronx County Supreme Court (Lyman, J.), annexed infra, marked 'A', for identification.

[2] 378 U. S. 368 (1964).

It is clear from the holdings of the United States Supreme Court in *Rogers* v. *Richmond*, 357 U. S. 220 (1961); *Townsend* v. *Sain*, 372 U. S. 293 (1963); *Fay* v. *Noia*, 372 U. S. 391 (1963), that the federal courts possess the power to examine state court proceedings and to apply proper constitutional standards in evaluating the determination reached thereunder, and to reach an independent conclusion as to the facts when a prisoner petitions the court to do so.

Judge William H. Becker of the United States District Court, Western District of Missouri, observed:

> "We hold that a federal Court must grant an evidentiary hearing to a habeas corpus applicant under the following circumstances: if . . . (2) the State factual determination is not fairly supported by the record as a whole . . ." (Emphasis supplied)[3]

ARGUMENT*

The argument of the question presented is set forth in toto, in a memorandum of law annexed hereto.

SUMMARY OF THE CASE

Since the relator's utterance of "guilty" on the record in New York in the presence of a lawyer[4], New York's

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[3] Remarks at the judicial conference of the Eighth Circuit at Rochester, Minn. July 25, 26, 1963 (33 Frd. 363, 452, 472) quoting Townsend v. Sain, U. S. 203, 83 S. Ct. 745, 9 L. Ed. 2d at 786.

* A true copy of relator's argument, composed of brief submitted to the New York A. D. 1st Dept., by the Legal Aid Society, and Respondent's opposing brief is annexed and enclosed herewith marked 'B' and 'C' respectively.

[4] On February 10, 1956, relator was appointed counsellor Frazier Davidson, by the Bronx County Court. On January 30, 1962, an

(*footnote continued on following page*)

record would imply that relator's guilt is as overwhelming and conclusive as the probability that the sun will rise tomorrow. But such is not the fact.

On the surface the conviction against relator looks impressive: relator was identified in a public street, in the night time, in New York City some two days after a crime had been committed; that he voluntarily confessed the crime in the police station after arrest; that he pleaded guilty in the presence of a lawyer. Though scrutiny of the alleged identification and circumstances surrounding the alleged confession and guilty plea however indicates the crucial sham of the conviction documented against relator by the State of New York.

The proof in the case shows that there were no witnesses who placed relator at the scene of the alleged crime; no gun was found as alleged in the State's indictment; and, that outside of the existence of an alleged confession attributed to relator in the police station after arrest, there is not one scintilla of circumstantial evidence connecting relator with commission of the alleged crime.

Still on the record, it is revealed, that relator, when arrested was a 20 year old indigent youth, and had resided in New York about 90 days prior to arrest, employed as a truckman's helper; had had previous non-New York arrests—all misdemeanors, but had never before pleaded guilty to a felony or before represented by an attorney.

That relator following arrest on January 25, 1956, was detained at the Bronx police station without booking, on an open charge, not informed of any rights prior or subse-

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(*footnote continued from previous page*)

order was entered in the New York A. D. 1st Dept., disbarring Attorney Frazier Davidson for having induced two Bronx clients to lie about their residence in order to obtain a divorce in South Carolina without going there to live. The disbarment order stated that Mr. Davidson first denied the charge then recanted and confessed to having destroyed his records on the case.

quent to arrest, from 7:00 p.m., while the record[5] claim is, that relator on or about the hour of 1:00 or 2:00 a.m. the next morning confessed, voluntarily to a so-called robbery.

That relator on the initial appearance before the court on the afternoon of March 16th, 1956, refused to accept an offer to plead guilty to a so-called reduced charge of robbery or to enter a guilty plea; but, that following a half-hour extemporaneous out-side-the-court-room-door conference with the assigned counsel Frazier Davidson, relator made a *second* appearance into the court room and entered the guilty plea[6], to a so-called reduced charge of robbery. But relator was not prior to the guilty plea apprised by the court of the consequences of the plea, or of the nature and meaning of the charge.

In this instant case the relator is illegally imprisoned; tyranny and oppression has leveled an illegal, unjust and unconstitutional conviction upon the relator's head. The infirmity in the proceedings which resulted in relator's conviction and in being sentenced to prison, and in presently being barred from showing that a confession attributed to him in the police station after arrest is a false product of coercion and torture, and involuntary, is that the proceedings are ones against the Constitution. From the principles of the laws as set forth herein, as well as the reasons for these principles, which are sustained by all the authori-

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[5] The facts heretofore set forth under *Statement of Facts,* and herein *Summary of the Case,* are undisputed facts on the record, and such record is therefore not submitted here, but the record is subject to judicial notice. (Fed. R. Civ. P. 43).

[6] In 1962, relator, after unsuccessfully seeking to locate Attorney Frazier Davidson and secure an affidavit, filed an application with the court to set aside the conviction on grounds, that Attorney Davidson, had, just prior to the plea, advised the relator that the charge to which the D.A. was allowing the plea was a misdemeanor—not a felony; and that relator did not discover the fact until sentenced on the felony.

ties which declare the law on the subject, the relator McKinley Williams, could not be held in imprisonment and deprived of his liberty under such circumstances and is therefore entitled to immediate release.

CONCLUSION

That relator is a born citizen of the United States, over the age of 21 years and of sound mind; that he executed this petition and the annexed papers at Green Haven State Prison; that he knows the contents thereof; and that he believes the same to be true.

PRAYER

WHEREFORE RELATOR HUMBLY PRAYS, that this Honorable Court for all the reasons set forth herein, and in the annexed memorandum of law, issue and sustain a writ of habeas corpus commanding the respondent warden to produce relator before this Court on a day and at a time certain to be named; that an evidentiary hearing be had with the State records made available to sustain the position of relator; and on the result of such hearing the writ of issue, and relator ordered discharged from respondents custody and remanded to the jurisdiction of the Bronx County Authority for disposition in accordance with the order of this Court, and grant such further relief as justice requires to secure to relator the rights guaranteed to him under the laws of this people.

Dated: July 8, 1966.

Respectfully Presented by,

McKINLEY WILLIAMS #10591,
Relator-Petitioner, Pro se.

(Sworn to by McKinley Williams July 18, 1966.)

Memorandum of Law.

Introduction

This is a memorandum of law arguing in support of a petition for a writ of habeas corpus to secure an order directing that relator-petitioner (hereinafter called relator) be discharged forthwith from further illegal custody in the State of New York held under a judgment of conviction obtained in direct violation of the Constitution of the United States of America.

A fact-finding evidentiary hearing is sought in this Court, with the production of the State records, to adequately determine the issues raised herein under the Federal Constitution; that the relator be removed from further illegal custody of the herein respondent agent *pendente lite*, to the Federal House of Detention at West Street, New York, N. Y.

The federal question was properly raised in the State Courts although a fact-finding hearing has been denied; and ergo, there is no State Court record of factual determination to be evaluated, only the conclusions of the State Court Judge. Wherefore relator is entitled to an independent hearing in this Court where—as here—the State Court determination affects a denial of Constitutional due process. (*Townsend* v. *Sain*, 372 U. S. 293 (1963); (*Fay* v. *Noia*, 372 U. S. 391 (1963)).

As heretofore alleged (and fully substantiated by documentary proof of the State's record): a pre-indictment confession forms the base, and evidentiary pith of the indictment and guilty plea upon which the relator's conviction is grounded.

But the relator will herein demonstrate to this United States District Court, and prove, that his guilty plea cannot be deemed a waiver of his guaranteed right to Constitutional due process; and that notwithstanding such guilty plea relator is not precluded from proving that such

confession was involuntarily procured in violation of due process contrary to the Federal Constitution.

CAN THE STATE OF NEW YORK, CONSISTENT WITH THE 14TH AMENDMENT TO THE UNITED STATES CONSITUTION, DEEM RELATOR'S GUILTY PLEA ENTERED PRIOR TO JACKSON V. DENNO[1], AN INDISPENSIBLE WAIVER OF HIS RIGHTS TO CHALLENGE THE INVOLUNTARINESS OF A CONFESSION, EVEN THOUGH UNDER JACKSON V. DENNO, RELATOR AT TRIAL COULD NOT HAVE HAD A FAIR DETERMINATION ON THE ISSUE OF VOLUNTARINESS, AND WHETHER OR NOT SUCH RULING IN THE INSTANT CASE VIOLATED RELATOR'S RIGHT TO DUE PROCESS?

By petition dated August 28, 1964, relator sought to have his conviction vacated and set aside in the State Courts on grounds that the judgment is predicated on a confession obtained in violation of due process under the 14th U.S.C.A. in that the confession was obtained by coercion and duress, and while relator was without counsel and before he had been advised of his rights; and that because of the existence of the involuntary confession relator could not possibly have had a fair trial under the indictment.

In rebuttal, the State's Prosecutor argued, "that relator by pleading guilty under the indictment is deemed to have waived his right to put in issue the legality of the admissions that he had made prior to his plea," citing *People* v. *Nicholson* (11 N. Y. 2d 1067). Thereafter, relator's application was denied by order of the Bronx County Court.[2]

People v. *Nicholson, supra,* was decided by the New York Court of Appeals in 1962, and is authority for the proposition that a defendant who has pled guilty while represented by counsel cannot subsequently collaterally attack the

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[1] 378 U. S. 368 (1964).

[2] Copy of County Supreme Court decision annexed infra, marked 'A'.

voluntariness of the confession which was used during his trial.

On April 22, 1965, the New York Court of Appeals reaffirmed it's *Nicholoson* mandate, holding: "That a plea of guilty waives any objection to the manner in which the confession was obtained." *People* v. *Dash* (16 N. Y. 2d 493).

Moreover, at the time of relator's indictment and conviction on March 16, 1956, the general rule repeatedly adhered to in the decisions of the New York Court's was, that the voluntariness of a confession was a question of fact for consideration by the jury to be resolved along with the issue of guilt or innocence. *Balbo* v. *People* (80 N. Y. 484); *People* v. *Vargas* (7 N. Y. 2d 555); *People* v. *Lane* (10 N. Y. 2d 347); *People* v. *Everett* (10 2d 500).

On June 23, 1964, the United States Supreme Court in the case of *United States ex rel. Jackson* v. *Denno* (378 U. S. 368), condemned as unconstitutional New York's method for determining the involuntariness of confessions in that the method was fundamentally unfair, and violated due process.

In January 1965, the New York Court of Appeals gave the Jackson decision retroactive effect in New York by promulgating the opinion in the case of *People* v. *Huntley* (15 N. Y. 2d 72).

Accordingly, the relator contends that his guilty plea cannot be deemed a waiver of his right to challenge the involuntariness of the pre-indictment confession, since under *Jackson* v. *Denno, supra,* relator at trial, could not have had a fair determination on the issue of voluntariness nor a fair trial; and ergo, relator in effect by pleading guilty did not waive any genuine and valid right, since a waiver of an unfair procedure constitutes no waiver *at all.*

The relator further submits, that the State's former pre-*Jackson* procedure formed only a "hollow" right, without a warranty of fundamental fairness (sic) contrary to due

process of law under the 14th Amendment, and it follows, that relator by pleading guilty, cannot be deemed to have waived any "genuine" right, under the 14th Amendment, where the right, if effected, could only have resulted in an unfair determination. But, the result is *non sequitur*, where a so-called "waiver" of a fundamentally unfair process, repugnant to due process, is "deemed" to be a "waiver," when equated with a "waiver" of a "right" guaranteeing fundamental fairness consistent with due process.

Although relator could have went to trial and challenged the confession to seek to have it declared involuntary; but his failure to do so cannot foreclose a contemporary challenge, merely by presupposing a vague waiver when it is perfectly plain from the dicta of *Jackson* v. *Denno*, that under the State's futile procedure no fair result would have followed even if the initial challenge had been made.

In this instance moreover, the relator was cast into a pre-trial form of limbo, in that he could not have had a fair trial because of the mere existence of the confession and at the same time could not have had a fair determination on seeking to void it from the case as a preliminary guarantee to a fair trial.

An accused thus cast into such an unfair pre-trial dilemma, and the state court's fail to redress the unfairness; and where, a confession does exist, but a challenge would show it to be involuntarily procured, and it cannot be said that the same result would follow, then the universal sense of justice would be shocked if the due process clause of the Constitution—*the law of the land*—offered no redress in such situation.

This case stands on its own facts—as do all other due process cases—and cannot be summarily judged by rigid, pre-formulated rules. *Betts* v. *Brady* (62 S. Ct. 1252, 316 U. S. 455, 86 L. Ed. 1595 (1942).

The New York Courts refused to appraise the totality of facts, but rigidly held that, since, based on the case of

People v. *Nicholson*, *supra*, relator pleaded guilty with a lawyer at his side, he cannot demonstrate and prove in a New York Court, that the confession was involuntarily procured by torture (notwithstanding that the same is false and the sole evidence connecting relator with an alleged crime). The crass and flagrant injustice akin to this strait-jacket dogma makes a mockery of "that fundamental fairness essential to the very concept of justice." *Payne* v. *Arkansas* (78 S. Ct. 844, 356 U. S. 560, 2 L. Ed. 975, 1958). In the present case, the ends of justice were thwarted not by the relator's own action; but, that relator was prevented from having a fair trial by the State's own whilom procedure. The question however, should not be How a fair trial was denied, but If a fair trial was denied!

> "The Fourteenth Amendment is a protection against criminal trials in State Courts conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice, and in a way that necessarily prevents a fair trial." *Lyons* v. *Oklahoma* (64 S. Ct. 1208, 322 U. S. 596, 88 L. Ed. 1481).

Is relator McKinley Williams' plea of guilty to a basically unfair procedure, notoriously repugnant to due process, a waiver of his Constitutional right to be afforded due process of law in the State of New York?

Can a party waive a right when its effect is to put in motion an unfair process and effect an inevitably unfair determination?

The Nation's highest Court has held as basic to our system of jurisprudence the right of a person accused to have a fair trial—"a right to his day in Court," *Re Oliver* (68 S. Ct. 499, 333 U. S. 257, 92 L. Ed. 682 (1948); and such right or the fundamental requisites to the pro-

ceedings which make up the right cannot be waived, unless based an a fundamentally fair process, consonant with due process; and only by the party involved, with an intelligent and knowing intention to relinquish it. Further, as in the waiver of the assistance of counsel, if the right to challenge the involuntariness of the confession is to be waived, *it would be better for it to appear upon the record. Johnson* v. *Zerbst* (58 S. Ct. 1019, 305 U. S. 458, 82 L. Ed. 682 (1938).

Here moreover, the use of the "term" "waiver" falls readily within the "bad" type categorized by Mr. Justice Black in the majority opinion in *Green* v. *Illinois* (246 U. S. 184 (1957):

> "'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right."

To therefore, under the *de novo* procedure laid down in *Jackson* v. *Denno*, deny relator the right to show the involuntariness of a confession, attributed to him in the police station, after arrest, by superimposing a procrustean waiver upon his guilty plea violates that *fundamental fairness essential to the very concept of justice*, guaranteed relator pursuant to the due-process and equal protection clauses of the 14th Amenndment to the Constitution of the United States and (sic) deprives the relator of his liberty without due process of law.

Accordingly, for the reasons articulated, and in the interests of justice, relator should be granted an opportunity to challenge the confession, consistent with due process as enunciated in *Jackson* v. *Denno, supra*, to lay a corresponding prerequisite base for guaranteeing relator a fair trial, which relator could not have had prior to the advent of *Jackson* v. *Denno, supra*.

Memorandum of Law.

CONCLUSION

Asking Court to review all papers included by relator and a hearing should be ordered (3) and the relief prayed for should in all respects be granted.

Dated: July 8, 1966.

McKINLEY WILLIAMS,
Relator-Petitioner, *Pro se.*

STATE OF NEW YORK)
COUNTY OF DUTCHESS) ss.:

McKINLEY WILLIAMS, being duly sworn according to law deposes and says, that he is the relator-petitioner above named, and the author of foregoing petition and knows the contents thereof, and that he believes the same to be true.

McKINLEY WILLIAMS.

Exhibit "A".

SUPREME COURT,
COUNTY OF BRONX.
SPECIAL AND TRIAL TERM PART XII

File Number 118 1956

Motion for: Vacate Judgment of Conviction

Submitted 9/14/64

Present: Hon. WILLIAM LYMAN, County Judge.

THE PEOPLE OF THE STATE OF NEW YORK,

against

McKINLEY WILLIAMS,

	Defendant. Papers Numbered
Notice of Motion and Affidavit Annexed	1
Answering Affidavits	2

Upon the foregoing papers this motion is in all respects denied. Defendant moves to vacate the judgment of April 19, 1956 convicting him on his plea of guilty of robbery, second degree, upon an indictment for robbery, first degree, whereunder he was sentenced to the Elmira Reception Center for a term of 7½ to 15 years by County Judge Eugene G. Schulz. Defendant presently contends that he was illegally arrested on a public street, brought to a police precinct where he was questioned without aid of counsel, without having been informed of his right to legal

assistance and not having been advised of his right to remain silent; that he was intimidated, terrorized and coereed into making admissions of guilt as to a two day old alleged robbery. He further alleges that he was not arraigned in court until about 19 hours after his arrest and, moreover that counsel who represented him in the indictment proceedings was inadequate and incompetent. Relief is urged herein upon the basis of two United States Supreme Court decisions, i.e. Escobedo v. Illinois and Jackson v. Denno, both decided June 23, 1964, and relating to involuntary confessions. In Escobedo, supra, defendant's counsel had been denied access to him by the police during his interrogation and is clearly distinguishable from the instant case. Besides the issue of a forced confession may not be raised under coram nobis (People v. Howard, 12 N. Y. 2d 65). Furthermore defendant waived this issue by his plea of guilty (People v. Nicholson, 11 N. Y. 2d 1067). The preliminary hearing mandated by Jackson v. Denno, supra, is not retroactive (People v. Milford, Sup. Ct. N. Y. County, Postel, J., N.Y.L.J. 8/26/64), undue delay in arraignment after a legal or illegal arrest may not be reviewed by way of coram nobis (People v. Fairfield, 16 A. D. 2d 992) and finally, there is no showing of incompetency of counsel (People v. Tomaselli, 7 N. Y. 2d 350; People v. Brown, 7 N. Y. 2d 359).

September 14, 1964.

/s/ W. L.,
J. S. C.

Certified by Clerk of Bronx County,
September 14, 1964.

/s/ JOHN J. HANLEY.

Affidavit of Murray Sylvester in Opposition.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MURRAY SYLVESTER, being duly sworn, says:

I am an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the respondent herein. I make this affidavit in opposition to petitioner's application for a writ of habeas corpus on information and belief based upon telephone conversations with the office of the District Attorney of Bronx County and upon records and papers furnished to me.

Petitioner is presently held in custody by the Warden of Green Haven State Prison, Stormville, New York, pursuant to a judgment of conviction rendered in the County Court, Bronx County.

Petitioner pleaded guilty on March 16, 1956 to robbery in the second degree. He was sentenced on April 19, 1956 to imprisonment for a term of not less than 7½ nor more than 15 years (EUGENE G. SCHULZ, J.). A copy of petitioner's fingerprint record furnished by the State Department of Correction is attached hereto and marked Exhibit "A".

The Issues

Petitioner contends that his federally protected rights were violated because he made an involuntary confession before he pleaded guilty. He contends that, following *Jackson* v. *Denno*, 378 U. S. 368, the confession would have to be set aside and apparently concludes therefrom that his plea of guilty and conviction would thereupon be declared void and he be set at liberty (Affidavit in support of petition, p. 3 of petitioner's papers). Respondent contends that invalidity of the confession, even if shown, would not avoid the conviction upon petitioner's guilty plea.

Affidavit of Murray Sylvester.

Respondent also contends that the pendency of petitioner's appeal from denial of *coram nobis,* in New York should bar consideration of this application.

Prior Proceedings

According to the office of the District Attorney of Bronx County, petitioner has brought six *coram nobis* proceedings in the State of New York, attacking his conviction. All of these were decided adversely to him at Special Term. He appealed four of them and received affirmance of three of them. His fourth appeal, which was from a denial by the New York Supreme Court, on November 30, 1964, of his application for a writ of *coram nobis* to set aside the conviction which he attacks herein, is presently pending in the Appellate Division of the Supreme Court, First Department.

The issue raised by petitioner herein was raised in the Supreme Court of New York, along with other issues, and determined adversely to petitioner in a decision by Mr. Justice Lyman dated September 14, 1964, a copy of which is attached to petitioner's papers and marked Exhibit "A" (following page 12 petitioner's papers). This decision was affirmed upon appeal.

POINT I

EVEN IF THE CONFESSION WERE SHOWN TO HAVE BEEN INVOLUNTARY THE PLEA OF GUILTY IS SHOWN TO HAVE BEEN COERCED AND FURNISHES A CONSTITUTIONAL BASIS FOR THE CONVICTION.

Petitioner's confession was not used as a basis for his conviction. Accordingly his attack on the validity of the confession is not material. As the Supreme Court of the United States said in *Townsend* v. *Burke,* 334 U. S. 736 at

page 738:

"In this present case no confession was used because the plea of guilty in open court dispensed with proof of the crime. Hence, lawfulness of the detention is not a factor in determining admissibility of any confession and if he were temporarily detained illegally, it would have no bearing on the validity of his present confinement based on his plea of guilty, particularly since he makes no allegation that it induced the plea."

Point II

THE PENDENCY OF PROCEEDINGS IN NEW YORK STATE BY PETITIONER TO SET ASIDE THE CONVICTION HEREIN ATTACKED BARS THE APPLICATION HEREIN.

There is presently pending in the Appellate Division, First Department, New York State Supreme Court, an undetermined appeal by petitioner from a denial of a *coram nobis* writ addressed to the same conviction which he attacks herein. In such a situation this Court has denied relief, such as petitioner now asks, which could be made unnecessary by the New York proceedings. *U. S. ex rel. Eastman* v. *Fay,* 62 Civ. 3633, S.D.N.Y., November 27, 1962, wherein the Court stated, per WEINFELD, D.J.

"Moreover, it appears that there is presently pending in the Appellate Division, Second Department, of the New York State Supreme Court an appeal by petitioner from the denial of his most recent application there for a writ of error coram nobis which he applied for following the determination of Mapp v. Ohio. While it is true that the writ there was applied for upon search and seizure grounds, a distinction which petitioner stresses, the fact is that if his appeal is up-

held it would necessarily result in the vactur of the judgment of conviction. Accordingly, it appears that petitioner has not exhausted his available state remedies."

See also *U. S. ex rel. Ellington* v. *Follette*, 65 Civ. 3287, S.D.N.Y., April 12, 1966 (TYLER, D.J.).

Conclusion

It is respectfully submitted that petitioner has not asserted facts which, if true, would sustain a writ of habeas corpus. In any event petitioner's application should be denied because of the pendency of the New York proceedings.

WHEREFORE, the respondent prays that the petitioner's application for a writ of habeas corpus be in all respects denied.

(Sworn to by Murray Sylvester on August 18, 1966.)

Exhibit A, Annexed to Foregoing Affidavit.

PAUL D. McGINNIS
COMMISSIONER

August 11, 1966
CONFIDENTIAL

STATE OF NEW YORK
DEPARTMENT OF CORRECTION
DIVISION OF IDENTIFICATION
ALBANY, N. Y. (12225)

This certifies that fingerprints of the following named subject have been compared and the following is a true copy of the records of this Division.

PAUL D. McGINNIS

D. C. I. No. 565632X B M 5 8 1936

Contributors of Fingerprints	Name and Number	Arrested or Received	Charge	Disposition
WH Columbus Ohio	McKinley Williams 7812	6-21-54	PL	$25/$7.
PD, Columbus Ohio	McKinley Williams 44324	6-19-54	Pet Larc	6-21-54 $25 & costs
PD, Middletown Ohio	McKinley Williams 4164	8-8-54	Invest	released
PD, Dayton Ohio	McKinley Williams 29345	8-18-54	drk & CCW	8-18-54 & 8-20-54 $10 & C susp all ⅓ mos in WH comm confiscate weapon
Dayton Corr Farm Dayton Ohio	Williams McKinley 111-084	8-20-54	CCW	3 mos
PD, Dayton Ohio	William McKinley 29 345	11-23-54	inv larc by trick	11-23-54, $50 & C $ 30das. Comm WH
NYC Wkhse.	—(Rpt. Rec. Ctr.)	8-20-54	CDW 3Mos.	on chg of larc by trick
Dayton Corr Farm Dayton Ohio	McKinley Williams 112-679	11-23-54	fraud obt money	59.40 & 30das.
PD Columbus Ohio	McKinley Williams 44324	1-6-55	Inv. Gr. Larc. #2 Petit Larc.	Inv. lifted & $50 & Costs 1-8-55
PD, Columbus Ohio	McKinley Williams 44324	2-8-55	inv GL PL	2-10-55 lifted (2) 30das. WH $10(
PD, Columbus Ohio	McKinley Williams 44324	5-10-55	vag (2) resisting	& C (1) $10. (2) $10. & C

* Represents notations unsupported by fingerprints in D.C.I. files.

Please advise if we can be of any further assistance to you in this matter.

Exhibit A, Annexed to Foregoing Affidavit.

Contributors of Fingerprints	Name and Number	Arrested or Received	Charge	Disposition
*PD, Dayton Ohio	McKinley Williams 29345	6-16-55	inv L by trick	6-17-55 $50 & C & 30das. Comm. WH on chg. of fraud practice
*PD, Mansfield Ohio (Rpt. Wash. Bur.)	McKinley Williams 853	9-29-55	dr on expired registration	$10 & costs
NYC PD 41Pct 190	McKinley Williams 1—Kinny Williams 369392	1-25-56	Rape Deg. Asslt. & Robb., 1899 (Toy Gun)	1-29-56 Reception Center
Probation Dept. Co. Crt. Bronx, NY	McKinley Williams	Prts. recd. 3-20-56	Robbery 1st P. G.to Robbery 2nd 3-16-56	
Reception Center Elmira, N. Y.	McKinley Williams 13762	sent. 4-19-56 recd. 4-24-56	Conf Robb 2nd	7-6-0/15-0-0 (Bronx Co.) 6-25-56 #14647 Trans. to Attica Pr.

Reply Affidavit of McKinley Williams.

McKinley Williams, under the penalty of perjury deposes and says:

That he is the Relator-Petitioner (afterwards called Relator) in the instant action and makes this reply to an opposing affidavit by the counsel for the Respondent, Asst. Atty.-Gen. Murray Sylvester, dated August 18, 1966.

For the first time the State proposes in opposition: 1. (Point I) That it's Court rulings[1] be up-held by this Federal Court on the theory "that a showing of involuntariness of the confession is an immaterial issue to the conviction being had" and; 2. (Point II) That based upon information and belief and a telephone conversation with a party in the Bronx County D. A.'s office relator has an appeal pending in the New York Appellate Division and therefore his federal habeas petition should be summarily denied.

Relator's reply to the statements appear in the order listed.

(Point I)

1. The sole issue before this United States District Court, sought to be determined, is the New York Court ruling denying relator the right to challenge the involuntariness of the confession, and holding: "That it is deemed that relator 'waived' his right to challenge the confession." (See: Relator's Petition pgs. 8, 9). Any other issues are collateral, and subject to determination on a separate and independent adjudication.

The analogy to Townsend v. Burke (334 U. S. 736), is inapposite. There the defendant could *not* have been de-

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[1] Order of Bronx C. Sup. Ct. dated September 14, 10y4, denying coram nobis application. (Lyman, J.). Affirmed App. Div. February 2, 1966. (See: Relator's Petition Exhibit 'A').

prived of a fair trial, because the State's procedure afforder, by law, a fair method of determining the issue of voluntariness of a post-arrest confession. And the defendant, at trial could therefore have a fair determination on such issue.

> Under Illinois law the admissibility of the confession is determined solely by the trial judge, but the question of voluntariness, because it bears on the issue of credibility, may *also* be presented to the jury. See, e.g., *People* v. *Schwartz*, 3 Ill. 2d 520, 523, 121 N. E. 2d 658, 760; *People* v. *Roach*, 369 Ill. 95, 15 N. E. 2d 863.

(Moreover the defendant there sought to avoid the confession merely because of a delay in his arraignment, having on bearing on reliability as to form the predicate of a "hollow" guilty plea.)

In the present case however, the relator could *not* have had a fair trial because the State's procedure, by law, denied a fair determination on the issue of the voluntariness of the confession. *Jackson* v. *Denno*, 378 U. S. 368 (1964).

(Point II)

2. Under the penalty of perjury relator affirms that he has made *no* application to the New York Appellate Division, First Department, as the conditional prerequisite to seeking an appellate reivew (N. Y. C.P.L.R. §§ 1101, 1102). Annexed hereto marked 'D' for identification, is a true copy of a letter from the office of the Clerk of the Appellate Division confirming the facts.

Knowing that relator *has* exhausted his state court remedies the Respondents do not allege otherwise; rather, they proceed by indirection, citing two federal court deci-

sions which may imply as much, but are of such tenuous and remote analogy that further comment is unwarranted.

Suffice it to say in *arguendo* however, that since the so-called pending First Department action is admittedly the same as the present one, and the former was instituted subsequent to the present petition (and there is no claim that this present is not properly before this Court) then the outcome of the former state action would be academic.

MISCELLANEOUS

(a) Two (2) applications to inspect grand jury minutes, denied and not appealable; all lumped under "label" *coram nobis* to total six. (Respondent's affidavit p. 2, par. 3).

(b) Relator could not possibly have been arrested and committed to the New York City workhouse on the 8-20-54, for a charge of CDW (Carrying Dangerous Weapon) as noted: Respondent's Ex. 'A', Line 8. Because on that same day August 20, 1954, relator was arrested in Dayton, Ohio, for possessing a so-called concealed weapon—a pocket knife, and thereafter served a 90-day prison term as the record itself indicates.

CONCLUSION

To even postulate a conclusion that relator is entitled to no relief after a showing and proving of involuntariness, as a capstone to denying the instant relief sought in this Court, is to offend the common sense of mankind with a proposition too preposterous for serious belief.

WHEREFORE RELATOR HUMBLY PRAYS, that this Honorable Court, for the reasons culled and articulated herein and those set forth in his petition, issue and sustain a writ of habeas corpus and that this Court grant such further

relief as justice requires to secure to relator the rights guaranteed to him under the laws of this people.

Dated: August 29, 1966.

Respectfully Presented by

McKinley Williams,
Relator-Petitioner, pro se.,

McKinley Williams,
No. 10591
Drawer B,
Stormville, New York 12582.

cc:

Louis J. Lefkowitz, Esq.,
Attorney General of the
State of New York,
Attorney of the Respondent,
80 Centre Street,
New York, N. Y. 10013.

Opinion of the District Court.

CROAKE, District Judge

MEMORANDUM

In a memorandum decision filed on September 13, 1966, the petition of the relator for a writ of habeas corpus was dismissed by this court for failure to exhaust state remedies. Relator now moves for reargument. Since it appears from the additional papers filed upon the instant application that the exhaustion requirement should be held to have been complied with in the circumstances, the motion for reargument will be granted. The September 13 order is to be vacated and the petition will be considered upon the merits.

In his petition, relator urges that his conviction be set aside on the grounds that a confession was coerced prior to his plea of guilty, and that he should not be deemed to have waived his right to challenge the confession, because, under the then existing procedure for determining the voluntariness of confessions, he could not have had a fair trial. Relator supports this ingenious argument by relying on *Jackson* v. *Denno*, 278 U. S. 368 (1964), the case which invalidated the New York procedure for determining the voluntariness of confessions.[1]

The arguments in support of the application have been carefully considered and it appears that the petition should

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[1] The ingenuity of the relator is further evidenced by the manner in which he "satisfied" the requirement that state remedies be exhausted before seeking relief in federal court. When the petition to this court was originally filed, the affidavit of the attorney general stated that petitioner had an appeal from the denial of a coram nobis application pending in the New York courts. To verify this, the court, sua sponte, requested an affidavit from the attorney general. The attorney general complied, and together with an affidavit submitted a photostatic copy of the notice of appeal. The relator received a copy of the affidavit and of the notice of appeal, whereupon he forthwith withdrew the pending appeal. Parenthetically, it might be observed that the relator has brought six coram nobis proceedings in the New York courts.

be and is denied. As the court of appeals said in *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018, 1019 (2d Cir. 1965): "A voluntary plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings." *Accord, United States ex rel. Martin* v. *Fay*, 352 F. 2d 418 (2d Cir. 1965). Under the circumstances alleged herein, this court is of the opinion that the plea of the relator was not involuntary. It is clear from the papers submitted that the disputed plea was made in open court with counsel present.[2]

It should be further noted that the plea of guilty by this relator was made in March 1956, some eight years before the *Jackson* decision (1964), in which the procedure then pursued in the New York courts to determine the voluntariness of a confession was declared unconstitutional.[3] It is most difficult, therefore, to accept the assertion that the right to go to trial was relinquished because he believed he would not receive a fair determination on the issue of voluntariness.

Accordingly, the petition is denied.

So Ordered.

Dated: New York, N. Y., October 26, 1966.

Thomas F. Croake
Thomas F. Croake

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[2] The assertion by the relator that his attorney informed him that he would be pleading guilty to a misdemeanor rather than to a felony is not sufficient for this court to grant the relator's request for relief, in light of the decision in *Martin, supra*, of the colloquy between the court and the defendant at the time of the plea, and of the prior experience of the relator with the law as indicated by his record.

[3] *People* v. *Huntley*, 15 N. Y. 2d 72 (1965), the case which implemented *Jackson* v. *Denno*, provides for a separate hearing on the issue of voluntariness only as to those cases which have gone to trial.

Order Granting Motion to Appeal Forma Pauperis.

The request of the relator in so far as he applies for a certificate of probable cause and leave to appeal in forma pauperis is granted.

So Ordered.

Dated: New York, N. Y., November 21, 1966.

S/ Thomas F. Croake
Thomas F. Croake
U. S. D. J.

United States Court of Appeals Order of Reversal.

UNITED STATES COURT OF APPEALS,

Second Circuit.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of March, one thousand nine hundred and sixty-nine.

Present: Hon. J. Edward Lumbard,
Chief Judge,
Hon. J. Joseph Smith,
Hon. Robert P. Anderson,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

United States Court of Appeals Order of Reversal.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the instructions contained in the opinion of this Court.

A. Daniel Fusaro,
Clerk.

By: Vincent A. Carlin,
Chief Deputy Clerk.

Richardson—Docket Entries.

July 7, 1965—Filed petition for writ of habeas corpus.

December 2, 1965—Denial for application of writ of habeas corpus.

December 10, 1965—Motion for reargument.

December 10, 1965—Denial of motion for reargument.

March 11, 1966—Application for certificate of probable cause and motion for leave to proceed in forma pauperis.

March 11, 1966—Denial by Judge Brennan of application for certificate of probable cause and order directing that notice of appeal be filed without prepayment of fees.

March 11, 1966—Notice of Appeal.

April 7, 1966—Application to the United States Circuit Court of Appeals for the Second Circuit for a certificate of probable cause.

April 7, 1966—Motion for leave to proceed in forma pauperis.

April 7, 1966—Motion for assignment of counsel.

May 18, 1967—Application for certificate of probable cause, leave to proceed in forma pauperis and for assignment of counsel granted.

Petition for Federal Writ of Habeas Corpus.

STATE OF NEW YORK }
COUNTY OF CLINTON } ss.:

To: Honorable Mr. Brennan, Judge of the United States District Court, Northern District of New York.

I Willie Richardson, being duly sworn, deposes and says.

That he is the relator above named in whose behalf this petition is made. That he makes this petition in support of his application for a federal writ of habeas corpus. That this petition respectfully shows to this honorable court and alleges: That relator is presently imprisonment restrained of his liberty in Clinton Prison, Clinton County, New York and the officer or person by whom he is so imprisoned and restrained is one Daniel McMann as warden of Clinton Prison. That relator has not been committed and is not detained by virtue of any judgment decree, final order or process issued by a court or judge have exclusive jurisdiction under the law of the United State or how acquired exclusive jurisdiction by the commencement of legal proceedings in such a court nor is he committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, nor the order of such a tribunal made in a special proceeding instituted for any cause execution or other process issued upon such a judgment, degree or final order; nor is he detained and restrained by virtue of any of the provisions specified in Section 1231 of the New York State Civil Practice Act. That the cause as present of said imprisonment and restraint according to the best knowledge and belief of your relator is a judgment of conviction emanting out of the county court of *New York County*, New York City, wherein relator was convicted by a plea of guilty of murder in the second degree and was subsequently

sentence to a term of (30 years to life). That the imprisonment and restraint of relator is illegal and unlawful in said judgment and conviction was had in violation of relators rights is therefore null and void. That your relator has sought relief throughout the state courts and has been denied continuously and that he has exhausted all possible state remedie's before before seeking relief through this honorable court.

On the 10th of December, 1964 relator was granted leave to appeal as a poor person by the Appellate Division First Judicial Department. And counsel was assigned to him. On the 27th of May 1965, the Appellate Division affirmed the judgment of the Court of New York County (Attached hereto and made part of this petition marked Exhibit "A" is a copy of affirmance) on the 8th of June 1965 relator denied a certificate of leave (or granted) to appeal to the Court of Appeals by the honorable M. Dye a judge of the Court of Appeals of the State of New York.

Federal Jurisdiction

That relator having exhausted all possible State Court remedie's now seeks relief through this Honorable Federal District Court which acquires jurisdiction pursuant to Sec. 2291 of title 28 United States Code Subdivision B, whereby federal relief can be sought by a State Court person on a constitutionary invalid conviction as where ever it appears that petitioners constitution rights were impaired in *Fay* v. *Noria*, 372 U. S. 391, 83 S. Ct. 322, 9 L. Ed. 2d 837. This Court after exhaustive discussions of the questions and the citations of many prior decisions of this Court held that a defendant who had been convicted by use of a coerced confession a State Court could obtain relief in a Federal habeas corpus proceeding notwithstanding the facts of a procedure default in the State Courts which Barred any challenge to the conviction in those courts.

That he makes this petition in his own behalf, relator respectfully request that this Honorable Court kindly bear in mind that he is a layman, not well versed in law, State nor Federal and that if he has any rights as privileges in his behalf for him as to consider those invoked by him in his own behalf although they be unknown to him at present and not specified individually herein.

That the above mentioned conviction upon Relators plea of guilty was had in violation of his constitutional rights and is null and void and that therefore the instant imprisonment and restraint is illegal and unlawful and in violation of his constitutional rights.

ARGUMENT AND FACTS PRESENTED BELOW

On Sunday evening about 2:30 P.M. March 24, 1963 I was picked up on suspicion and complisity concerning a homicide in which two relatives were killed at a dancing party. At the time of the altercation involving these two persons, I was the only other person present and when they drew knives and started stabbing at each other, I tried to stop them and break them apart, but I couldn't, I only succeeded in getting my clothes bloody. So I had to change clothes the police took me to the 126th St. Station House and I tried to explain what happened as far as I knew and showed them my bloody clothes, then they booked me on Homicide. I had asked them to contact an attorney that I knew because I was on parole at the time. They asked me that his name was, and when I told them "they said they had never heard of him" and refused to call or to let me call him. After incessive abuse, threat's and questioning I was finally coerced and forced to sign a confession against my will, implicating myself in something I had nothing to do with, other than being an acquaintance of both persons and attempting to help them

from hurting each other. After I signed the confession they told me that I hadn't been book before. On March 25, 1963 I appeared in court for a hearing, I appeared again on April 16, 1963 and was sent to Belleview Hospital for observation. Then on the 20th of April, 1963 I was informed that I had been indicted for Murder in the First Degree. Six months later on October 9, 1963 I was sentenced to (30 years to life) imprisonment in the State prison by Honorable Justice Pastel of New York County Supreme Court.

"Point One"

Petitioner states the confession was obtained from him by means of abuse and threat of bodily harm and therefore .... (illegible)
before he was forced to confess to something he hadn't done. See People v. Donovan 13 N.Y.S. 2d 148 (1963) which state's that a confession, taken by police, from a person accused of a crime after counsel has been denied access to him; was inadmissible in the trial and further: "confession even if true, if obtained in violation of Section 376, Criminal Code of Procedure, are not sufficient to subtain a conviction, concluding that the judgment be reversed and a new trial ordered."

Petitioner submits that it is established that a plea of guilty induced through concepts that shock the concious mind and which violates defendants constitutional rights of effective and representation, by court assigned counsel, must fare under the provisions of the 14th Amendment, to the constitution. See: Pennsylvania ex rel. Herman vs. Cloudy, 350 U. S. 116 (1956); Gideon vs. Washington, 373 U. S. (1963) and Lyndurn vs. Illinois, U. S. 373 (1963). In the recent case of U. S. vs. Escobedo, the Supreme Court reversed the conviction and held that Gideon vs. Wainwright decision extended the principle and ruled that

a person is entitled to consult with counsel as soon as investigation makes him a prime suspect. See also Leysa vs. Denno, 347 U. S. 556 A. D.; People vs. Leysa, 1, N. Y. 2d 199, in the case at bar, the illegalally obtained confession is the sole basis of the indictment and judgment of conviction. See: People vs. Evans, 1928, 224 App. Div. 415, 213 N.Y.S. 153, which states: the rights by an accused of a crime cannot and "must" not be denied or disregard." The forcible and compulsary extanlation of an admission in the police station to be used as evidence against a defendant, beyond a doubt comes squarely with the condemanation of both our fundamental and statutory laws—E. G. U. S. (constitution, Art. 45, 14) N.Y.S. constitution Art. 1 Sect. 6-12: and the code of criminal procedure—Sect. 395—State Law enforcement officers are constitutionally forbidden to procure evidence of a crime by methods that to "rock and grow" and the bar recognizes no distinction are between real evidence and coerced or forced confessions. Therefore there "must" be other and further evidence which does more than "merely tends to corroborate the trouth of admission or of a confession, because on admission of guilt cannot stand alone. See People vs. Ceuzzo, 292 N. Y. 85.

The very reason behind Sect. 395 Code of Criminal Procedure so to prevent a conviction, where in fact no crime has been committed by the defendant, see: People vs. Louis, 1 NY. 2, 137. Further; in People vs Wallace: 17 AD 2, 951. The court held that; that a statement taken from a defendant by an investigation officer, before arraignment and before being advised of his rights was inadmissible; citing People vs. Waterman, 9, N.Y. 2, 561: and People vs. J. Meyer, 11 N.Y. 2, 162 (People vs Meyer supra). In the case at bar the defendant was interrogated before he was formally charged on indictment without counsel present or without being allowed to contact counsel, although he had

requested same: it is showed that the ruling in Esobedo vs. State of Illinois, 32 LW. 4605-40606, US June 22, 1964, applies here. The question, and constitutional inquiries here in the case at bar is not whether the conduct of the state officers in obtaining the confessions or admissions was shocking, but whether the confession was "free and voluntary" under the circumstances. It should have been extracted by any sort of threat as violence or direct or implied promises. See Hardy vs U. S., 180 U. S. 224, 229 and Smith vs. U. S. 348, U. S. 147-150. In Malloy vs. Hogan, 373 U. S. 948, the Supreme Court held that the 14th Amendment guarantees the petitioner the protection of the Fifth Amendment privilege against self incrimination.

POINT TWO

Even though defendant's assigned counsel did not make the appropriate objections, that fact remains that under all the circumstances justice requires a new trial. See Code of Criminal Procedure, 527 and People vs. Brady, 14 AD 2, 575. In the case of U.S. vs Boyand, 23 Fed. 721 says on timely application, the court will vacate a plea of guilty, shown to have been unfairly obtained through ignorance "fear" or "inadvisement" fundamental to the standard of justice and fairness, implicit in the due process of the 14th Amendment in the requirement that a plea of guilty must be voluntary and understandingly entered—unmotivated by improper inadvisement or coercion in the State of N. Y. The case may be called the ~~Emtiotion~~ and fountain-head of the new concept of adherence to the rights granted every person accused of a crime as provide in the 14th amendment to the U. S. Constitution" which provides in fact, as follows: "nor shall any State deprive any person of his life, liberty or property, without due process of law," the showing in the case at bar, faces easily within

the tradition which requires that a plea of "guilty" not made understandingly and made thru ignorance and "fear" should be vacated. See Leonard vs U. S., 200 F. 2d 690 (c App. 8). The fact that court assigned counsel did not make the appropriate objections came about because he (lawyer) along with the District Attorney coerced petitioner into acceptance of a plea of guilty against his will and then denied petitioner the right to withdraw said plea after consideration. This fact also shown to this Honorable Court why the Court assigned counsel made no efforts to protect petitioner's constitutional and civil rights. See: People vs. Herman, 255 A. D. 314, 7 N.Y.S. 2d 560, which says a fair trial is fundamental requirement in a criminal prosecution, and so, the judgment should be reversed if the trial was not a fair one; however strong may be the evidence against the defendant." Petitioner submits that due to the inadiquacy of effective representation of court assigned counsel, he was deprived of, and not afforded a fair and inpartial trial. See: People vs. Steele, 65 N.Y.S. 2d 2161, (Gen. Sess. 1946) which states "a defendant who is denied due process of law, which the U. S. Constitution guarantees him, is not and cannot be afforded as having a fair and impartial trial".

Conclusion

Petitioner submitts that the United States Constitution; and the laws make in pursuance there of under authority of the U. S. are and shall continue to be the Supreme Law of the land," and shall therefore any violation as infringement of the provision's set fourth in the constitution is a violation of petitioners rights. The fact that petitioner was denied due process of law is such and infringement; and the denial of his rights to with draw his plea of guilty violated Sect. 337 of the criminal code of procedure. That the facts

in this petition can not be denied or refused, for the record with uphold them. That petitioner invokes this honorable court to hold an evidenting hearing with petitioner present in court to inquire into the facts alleged in this petition.

Petitioner prays that a writ of habeas corpus will be issued, Commanding him to be produced before this court together with the time and cause of such illegal judgment vacated, and for such other and further relief as this court may deem just and proper.

Respectfully submitted,

WILLIE RICHARDSON,
39501
Clinton Prison, Pro Se.

(Sworn to by Willie Richardson, July 2, 1965.)

Memorandum Decision and Order, Brennan, J., dated December 2, 1965.

BRENNAN, Judge

This is another of the now prevalent applications for a writ of habeas corpus directed to this court by a state court prisoner and based upon the contention that his plea of guilty to a reduced charge in a state court is invalid because same was induced by an alleged coerced confession.

It is alleged in the petition that on or about March 24, 1963 the petitioner attempted to act as a peacemaker in an altercation between two relatives, each of whom died as the result of stab wounds inflicted upon them. Upon petitioner's arrest, he was brought to the police station

and after questioning, he signed a confession implicating himself in the homicides involved. He alleges in a conclusive manner that his statement or confession resulted directly from police coercion after he had requested and been denied the right to communicate with an attorney. Petitioner was subsequently indicted in a two count indictment which charged him with the crime of murder in the first degree. Two attorneys were assigned as counsel to represent the petitioner and on July 22, 1963 in the presence of such counsel, he entered a plea of guilty to the crime of murder in the second degree upon the first count of the indictment and to cover the second count thereof. He was thereafter sentenced to be confined for from thirty years to life and is detained under the resulting commitment.

On or about June 30, 1964, petitioner sought by motion in the state court to vacate the judgment of conviction upon the contention that his plea was induced by the fact that he had been coerced into confessing his guilt. Relief was on July 27, 1964 denied in the state court upon the authority of Peo. v. Nicholson, 11 N. Y. 2d 1067. An appeal was taken. The action of the lower court was affirmed without opinion on May 27, 1965. Peo. v. Richardson, 23 A. D. 2d 969. Permission to appeal to the Court of Appeals was denied June 8, 1965. This application, verified July 2, 1965, followed.

The present application fails on its face to show that the contention, now advanced, had been presented to the state courts and in order to establish the fact, the petitioner has loaned to this court copies of the appellant's and respondent's brief in the Appellate Division which show that the present contention was in fact submitted to that court. It is therefore concluded that state court remedies have been exhausted.

Memorandum Decision and Order, Brennan, J., dated December 2, 1965.

Through the cooperation of the Attorney General and the District Attorney of the County of New York, a photostat transcript of the minutes of the proceedings in the Supreme Court, New York County, on July 22, 1963, when petitioner's plea was entered and on October 9, 1963, when sentence was imposed, have been made available by the District Attorney of New York County. The petition, together with the documents mentioned above, are before this court in the matter of the determination of the question as to whether the requested writ should issue. They are held to be sufficient to conclude that petitioner's plea was voluntarily entered and that no hearing is necessary. U. S. ex rel. McGrath v. LaVallee, 319 F. 2d 308 at 312 and cases cited. The facts disclosed will be briefly discussed.

As already indicated, the petitioner was represented by assigned counsel at the pertinent times involved. There is no allegation that such representation was ineffective. There is no allegation that petitioner was acting in any manner under either a physical or mental handicap. That petitioner was experienced in the matter of law violations is apparent from the allegation of the petition which contains a reference to him as a parolee at the time of the incident involved.

The transcript of the proceeding had at the time of the entry of the decree is somewhat lengthly and it is difficult to understand from a reading thereof how any court could have taken additional safeguards to make certain that the plea was voluntarily and understandingly entered. Request was made by counsel to withdraw the "not guilty" plea previously entered and to plead guilty to Count 1 of the indictment. After the court requested that the petitioner pay attention, he repeated the request of counsel made above. The petitioner indicated that such course of action was desired by him and that he had discussed same

with both counsel. In answer to the court's question as to whether or not he had been threatened or whether promises had been made to him as to the sentence to be imposed, the petitioner replied in the negative. On two occasions, he advised the court that the taking of the plea was of his "own free will and volition". The court then asked the following question—"Now, did you, on or about March 24, 1963 in the County of New York, wilfully and feloniously strike Rosalie Smith with a knife, thereby causing her death?" The defendant replied "Yes, sir." The court then took the plea. It is impossible for this court to understand how the trial judge could have more conclusively established that the plea of guilty was both understandingly and voluntarily entered. Almost three months later, when sentence was imposed, although opportunity was afforded, the petitioner raised no question as to the validity of his plea. Here the petitioner received the benefit of a plea to a reduced charge and the quashing of a further charge of a capital offense. He is now apparently dissatisfied with the bargain. The circumstances indicate that subsequent post-conviction attempts to obtain relief were the result of an afterthought prompted, no doubt, by legal education afforded during petitioner's subsequent confinement.

The law requires little discussion. This court is not required to blindly accept the allegation of the petition as presumptively valid. Edge v. Wainwright, 347 F. 2d 190. This rule would seem to apply, where a state of mind appears to be contradicted by a showing of the facts. It has long been held that a voluntary guilty plea, entered upon advice of counsel, is a waiver of all non-jurisdictional defects in any prior stage of the proceedings against a defendant in a criminal case. This principle has been recently repeated by our Circuit Court of Appeals in U. S. ex rel. Glenn v. McMann, decided August 26, 1965 and in

Memorandum Decision and Order, Brennan, J., dated December 2, 1965.

U. S. ex rel. Martin v. Fay, decided November 8, 1965. A reference to the option in U. S. ex rel. Glenn v. McMann, supra, would indicate that petitioner's reliance upon the language in U. S. ex rel. Vaughn v. LaVallee, 318 F. 2d 499 is misplaced. The decision here, that the state court record is sufficient and satisfactory for the determination of the issues involved (see U. S. ex rel. McGrath v. LaVallee, supra, at p. 312), may well rest upon the statement found in U. S. ex rel. Martin v. Fay, supra, to the effect that the facts and circumstances including the colloquy between the judge, who took the plea and imposed the sentence, and the petitioner are decisive in denying substance to the petitioner's present contention.

The court's attention is just called to the fact that although the transcript of the state court proceedings, referred to, seems to be a photostat of the original, same is not certified. There is no reason for this court to doubt the correctness or the completeness of such transcript but it is deemed advisable to return same to the District Attorney of New York County with the request that same be certified and returned to this court when it will be filed as a part of the record in this proceeding. The briefs, loaned by the petitioner and referred to above, will be returned to him with the understanding that if an appeal is to be taken from this decision, that same must be made available to the appellate court.

For the reasons indicated above, it is

ORDERED the application be and the same is hereby denied.

STEPHEN W. BRENNAN,
Stephen W. Brennan,
Senior U. S. District Judge.

Dated: December 2, 1965.

Minutes of Plea.

SUPREME COURT OF THE STATE OF NEW YORK,

SPECIAL AND TRIAL TERM—PART 34

THE PEOPLE OF THE STATE OF NEW YORK,

against

WILLIE RICHARDSON,

Defendant.

New York, N. Y., July 22, 1963.

Before: HON. GEORGE POSTEL, J.

APPEARANCES:

For the People: ROBERT McKEEVER, Esq., Assistant District Attorney.

For the defendant: ALFRED L. ROSNER, Esq., WILLIAM P. McCOOE, Esq.,

Defendant indicted for murder in the first degree.
Indictment filed April 11, 1963.

The Clerk: Your Honor directs at this time the calling of a case, Willie Richardson, in prison?

The Court: Yes.

The Clerk: And counsel, Mr. McCooe and Rosner.

Minutes of Plea.

(Defendant brought into the courtroom, where counsel are present.)

The Clerk: A defendant, in prison, Willie Richardson. And counsels, Alfred I. Rosner and William P. McCooe; both counsel present.

(Discussion at the bench off the record among the Court, Mr. McKeever, Mr. Rosner and Mr. McCooe.)

The Clerk: Now, counsel, do you at this time have an application to make to his Honor on behalf of this defendant?

Mr. Rosner: Yes. The defendant, with the permission of the Court and the District Attorney's consent, wishes to withdraw his plea of not guilty heretofore interposed to this indictment pending before this Court now, and to plead guilty to the second count of the indicement to cover both counts. Is the second count the one with—

The Court: Are you talking about Rosalie?

Mr. Rosner: Yes.

The Court: That is under the first count.

Mr. Rosner: I'll take the plea, then—I wish to correct what I said before. The defendant asks leave to plead guilty to the first count of the indictment.

The Court: No.

Mr. Rosner: That's murder—Rosalie—

The Court: You are asking—if I understand you, you want at the present time to withdraw his plea of not guilty, and your wish is to plead guilty to the crime of murder in the second degree—

Mr. Rosner: Second degree.

The Court:—under the first count of the indictment—

Mr. Rosner: That's right.

The Court: —to cover all the counts of the indictment. That's what I understand you to say.

Mr. Rosner: That's right, your Honor.

The Court: Well, do you accept that plea?

Mr. McKeever: That's a plea to murder in the second degree, under the first count of the indictment, to cover the indictment, and to cover all counts of the indictment. The People respectfully recommend the acceptance of that plea to the Court.

The Court: All right. Mr. Richardson, will you pay attention to me please? I understand from your counsel, who are both here, Mr. Rosner and Mr. McCooe, that you now desire to withdraw your plea of not guilty, heretofore entered, and now desire to plead guilty to the crime of murder in the second degree, under the first count of this indictment, to cover both charges and/or counts in this indictment; is that correct?

The Defendant: Yes, sir.

The Court: Now, did you discuss this case fully with Mr. McCooe and Mr. Rosner?

The Defendant: Yes, sir, I did.

The Court: Did you understand them when you spoke to them about your case?

The Defendant: Yes, sir.

The Court: Were you threatened in any manner, shape, or form, by anyone in order to induce you to take this plea?

The Defendant: No, sir.

The Court: Are you taking this plea of your own free will and volition?

The Defendant: Yes, sir.

The Court: Have any promises been made to you by anyone, that is, your counsel, the District Attorney, the court officers, jail keepers, or anybody, concerning the sentence which this Court, meaning I, will impose in this case?

The Defendant: No, sir.

The Court: You are taking this plea of your own free will and volition?

The Defendant: Yes, sir.

The Court: Have any promises—without any promises of whatever kind or nature so far as sentence is concerned; is that right?

The Defendant: Yes, sir.

The Court: Now, did you commit this crime?

The Defendant: Yes, sir.

The Court: Now, did you, on or about March 24, 1963 in the County of New York, wilfully and feloniously strike Rosalie Smith with a knife, thereby causing her death?

The Defendant: Yes, sir.

The Court: All right. Take the plea.

The Clerk: If I may most respectfully address your Honor: Does the Court at this time direct that this defendant, Willie Richardson, be advised of the provisions of Section 335-b, subdivision b, of the Code of Criminal Procedure?

The Court: Yes, sir. Will you please advise him.

The Clerk: Willie Richardson, Section 335, subdivision b, of the Code of Criminal Procedure, provides: If you have been previously convicted of crime, that fact may be established, and if you plead guilty or are convicted under this indictment, you may be subject to the additional or different punishment prescribed or expressly authorized by reason of such prior conviction.

And, Mr. Rosner, of counsel, advise the defendant of the legal provisions of said section, namely, 335, subdivision b, of the Code of Criminal Procedure.

Mr. Rosner: Yes.

(Mr. Rosner confers with the defendant.)

The Defendant: Yes.

The Clerk: Now, Willie Richardson, having been advised by counsel, do you fully understand the legal provisions of said section, namely, 335, subdivision b, of the Code of Criminal Procedure? And you, Willie Richardson, the defendant, must personally answer.

The Defendant: Yes.

The Clerk: Speak up.

The Defendant: Yes, sir.

The Clerk: Willie Richardson, do you now withdraw your plea of not guilty, heretofore interposed by you, and do you now plead guilty to the crime of murder in the second degree—.

The Defendant: Yes, sir.

The Clerk: —that plea under the first count of the indictment, to cover all the counts in the indictment filed against you? Willie Richardson, is that your plea?

The Defendant: Yes, sir.

(The defendant was sworn, and his pedigree was then taken.)

The Court: The probation department to investigate. Sentence is put over to September 27, 1963.

The Clerk: September 27th for sentence. The probation department to investigate.

ALFRED H. EHRLICH, CSR,
Official Stenographer.

Minutes of Sentence.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

SPECIAL AND TRIAL TERM—PART 40.

Indictment CR-1367-63

THE PEOPLE OF THE STATE OF NEW YORK,

against

WILLIE RICHARDSON,

Defendant.

SENTENCE

New York, October 9th, 1963.

BEFORE: HON. GEORGE POSTEL, J.

APPEARANCES:

For the People:

THOMAS A. REYNOLDS, Esq., Assistant District Attorney.

For the Defendant:

ALFRED I. ROSNER, Esq. and WILLIAM P. McCOOE, Esq.

Indicted for Murder in the First Degree.
Indictment filed April 11, 1963.
(On July 22, 1963, in Part 31, the defendant pleaded guilty of murder in the second degree, under the first count, to cover the indictment.)

Minutes of Sentence.

The Clerk: Willie Richardson. Mr. Rosner.

(The defendant is brought into the courtroom and stands at the bar.)

The Clerk: Willie Richardson, is that you?

The Defendant: Yes.

The Clerk: Is Mr. Rosner, standing beside you, your attorney?

The Defendant: Yes.

The Clerk: Have you any legal cause to show why the judgment of the Court should not now be pronounced against you according to law?

The Defendant: No.

The Clerk: Do you want your lawyer to speak for you?

The Defendant: Yes, sir.

Mr. Rosner: We respectfully ask your Honor to impose the usual sentence for second degree murder, twenty years to life, and not to impose any sentence as if he had pleaded guilty to both counts or to impose a sentence you would impose if he had pleaded guilty to life, murder in the first degree, which—

The Court: I don't know what you mean by "usual sentence". Each case is determined separately.

Mr. Rosner: Well, the usual sentence is, in a murder in the second degree plea, twenty years to life.

The Court: You mean the usual sentence is the exception to the rule.

Mr. Rosner: At any rate, your Honor, I have been very doubtful in my mind whether this defendant is medically insane.

The Court: Well,—

Mr. Rosner: But it's up to the Parole Board in the course of time to determine that. He will be there long enough for them to be able to make up their own minds. It is twenty years to life. And if you give that sentence, he can be kept there for the rest of his life, so we need not be concerned about him getting out any earlier.

Affidavit of Willie Richardson.

The Court: That is what I am concerned about.

The defendant is sentenced to State Prison for a term of thirty years minimum; maximum, life.

WILLIAM ROVEN,
Official Stenographer.

Affidavit of Willie Richardson, in Support of Motion for Reargument.

STATE OF NEW YORK }
COUNTY OF CLINTON } ss.:

To: The Hon. Stephen W. Brennan, District Court Northern District of New York, Utica, New York.

Willie Richardson, Petitioner herein, being duly sworn, deposes and says:

That he is the Petitioner in the above entitled cause and submits this affidavit in support of his motion for reargument of the denial of his motion in the nature of habeas corpus, rendered on the 2nd day of December 1965, by Honorable Judge Brennan, District Court Judge.

Your petitioner bases his motion for reargument on the fact that in Judge Brennans memorandum denying Petitioner's motion in the nature of habeas corpus, his honor stated, paragraph 6 page 3:

> "it is impossible for this court to understand how the trial judge could have more conclusively establish that the plea of guilty was both understandingly and voluntarily.

Affidavit of Willie Richardson.

Let a true reading of the minutes of the proceeding on 22nd day of Juty 1963 show that I the Petitioner try to withdraw by involuntary plea. As stated:

> I explained to the judge that I wanted to withdraw my plea of guilty. Because I was forced to sign a confession and plea to something that I did not do. The judge told me that the court has accepted the plea and that "was it." Now I ask you your honor what harm would it have done for me to withdraw my plea, is it because the state needs the conviction to balance the scale's of justice in case a guilty man beat his case one time with a good lawyer. But yet here I'm a person that did not commit this crime doing life in prison, because I could not take my plea back, so I could go to tial. There are many words in our constitution to keep our country free, but yet the one word in the millions I seek, (justice) is never given to me. Your honor I'm not asking for the state to open the front gate of this prison, I'm asking for a hearing to prove that all I calm in my petition is true. If I have this hearing I will prove without a doubt the truth (so help me god) that I did not commit this crime, I've been beat and lieded to so much your honor, that I feel that there is no justice in New York State. If need be to prove my innocence I will gladly pay the expense to return me to the court for a hearing.

In the memorandum on paragraph 1, page 5

> "The court's attention is just called to the fact that although the transcript of the state court proceedings seems to be a photostat of the original same is not certified."

Petitioner wishes to implore the honorable justice's indulgence to read the state courts proceedings on the 22nd

day of July 1963, which will prove conclusively that petitioner try to withdraw his involuntary plea, not to say that there is foul play but if a court record is not certified there may be a few pages lost. Therefore, in the light of justice this court should grant this motion for reargument in order that the court might judge Petitioner's motion in nature of habeas corpus with respect to this information now presented. For Petitioner believes that a different outcome would have resulted.

Wherefore, your Petitioner respectfully prays that an order be made and entered herein granting a hearing on this motion for reargument in the light of this new information; and your Petitioner further prays that he be present at this hearing in order that he might present the facts to the court, and for such other further relief as to this court may seem just and proper.

Respectfully submitted,

WILLIE RICHARDSON,
WILLIE RICHARDSON—Petitioner, (pro-se),
Box B, Dannemora, New York.

(Sworn to by Willie Richardson, December 8, 1965.)

Memorandum Decision and Order, Brennan, J., dated December 10, 1965.

BRENNAN, Judge

On December 2, 1965 the application of the above named state court prisoner for a writ of habeas corpus was denied and a five page memo filed. Under date of December 9, the petitioner forwarded a document entitled "Motion for Reargument". The document contains an affidavit in which petitioner appears to stress his innocence of the crime to which he entered a plea of guilty and that he should have been permitted to withdraw his plea of guilty in the state court. Although this application will be denied, the circumstances appear to be somewhat unusual and a brief memo for petitioner's information will be filed.

The burden of the original application was to the effect that petitioner's guilty plea was induced by the fear that a coerced confession would be used against him upon the trial. On page 8 of the original petition, there are two brief references which petitioner appears now to construe as asserting that he had sought permission to withdraw the guilty plea and that same was denied in violation of his fundamental rights. This court in the memo above cited made no reference to such a contention for the reason that there were no factual allegations to support any such contention. In fact, this court did not understand that such a contention was relied upon.

The present application will be denied for the reasons indicated.

1. Neither the original petition nor the present motion papers sufficiently allege the facts relative to any request or motion by the petitioner or in his behalf made at any time to the trial court that the guilty plea be withdrawn.

2. That the minutes of the pleading and sentence, which are a part of this record, contain no reference to any such motion or request.

3. If a motion to withdraw the guilty plea was in fact made to the state trial court at a time other than when the plea was entered or at the time of sentence, same should be disclosed and supported by affidavit of counsel or the failure to obtain such an affidavit should be explained.

4. Permission to withdraw a guilty plea invokes the court's discretion but must be made before judgment upon such plea is entered. New York Penal Law 337. The matter of the exercise of such discretion would not ordinarily raise a federal question.

5. There is no showing that petitioner has ever attempted to raise any such contention in the state courts. Although the briefs have been returned to the petitioner, it is the recollection of the undersigned that no such question was raised upon the appeal from the judgment of conviction. It follows that there is no showing of the exhaustion of state court remedies.

The petitioner's protestations of innocence of the crime to which he entered a plea of guilty are unavailing since this court has no power to pass upon such question. The state courts are under the same obligations as are the federal courts to afford the petitioner his fundamental rights. The present protest of innocence is directly contradictory to the petitioner's admission of guilt as appears in the minutes of the proceeding at which the plea was entered and set out in the original memo-decision of this court, dated December 2, 1965, which is in no way contradicted or explained even in petitioner's present application for reargument.

Order of Brennan, J., dated March 11, 1966.

For the reasons above indicated, the application for re-argument or reconsideration of petitioner's prior application is hereby denied, and it is

So Ordered.

Stephen W. Brennan
Stephen W. Brennan
Senior U. S. District Judge.

Dated: December 10, 1965.

Order of Brennan, J., dated March 11, 1966.

The within application for a certificate of probable cause to appeal from the decision of this court, dated December 2, 1965, reargument denied December 10, 1965, which denied the applicant's petition for a writ of habeas corpus, be and the same is hereby refused and denied.

The submitted notice of appeal from the above decision, together with your letter of March 9 to the Clerk of this court is filed in the Clerk's office without the requirement that fees therefor be prepaid, and it is

So Ordered.

Stephen W. Brennan
Stephen W. Brennan
Senior U. S. District Judge.

Dated: March 11, 1966.

Supplemental Affidavit of Willie Richardson, in Support of Petition for Writ of Habeas Corpus.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

WILLIE RICHARDSON, being duly sworn, deposes and says:

Because I did not have the aid of legal counsel at the time I filed my petition for habeas corpus in the District Court I failed to include several facts which are relevant to my petition and appeal from the denial thereof, namely:

1. Earlier on the morning of the homicide I had been in the apartment of the deceased, drinking, along with three other persons, namely Derry Pack, Charles Cardwell and Eddie Butler. Both Pack and Butler had apartments in the same building.

2. When my sister and brother-in-law began to quarrel the three of the aforementioned persons were no longer in the apartment having left earlier.

3. In the process of preventing my relative from injuring each other I received some scratches and cuts which caused blood to get on my clothes. Since my brother-in-law and I were the same size, approximately, I removed my bloody clothes and put on some of his clothes.

4. After this I left the apartment and went to a bar on Lenox Avenue. After having a couple of drinks I was returning to my sister's apartment when two persons whom I knew, told me that I should go around the corner to my sister's apartment.

5. When I arrived at the building I saw a crowd of people outside, and upon entering I was stopped by two detectives who began questioning me. After a few minutes of questioning they told me that I would have to go to the police station with them.

Supplemental Affidavit of Willie Richardson.

6. I was taken to the 126th Street Station House. In the same vehicle were the three persons with whom I had been drinking earlier.

7. When we arrived at the Station House the other three persons were taken into another room. I was handcuffed with my hands behind my back. When the detectives began questioning me I denied that I had been with the other three earlier in the day, because I did not wish to get them into any trouble.

8. I was then taken to another room and the detectives began questioning the other three men. When they brought me back into the interrogation room they confronted me with the fact that the other three persons had stated that I had been drinking with them earlier. I then admitted that this was true.

9. The police then released the other three men but kept me.

10. It was at this point that I requested that I be permitted to contact my attorney which request was denied.

11. The police then began to insist that I had killed my relative and repeatedly asked me to admit that I had done so. They told me that if I did not confess I would be convicted of first degree murder and electrocuted. I told them that I had not killed my relatives.

12. After questioning me for approximately fifteen minutes they then began to beat me physically. These beatings were administered to my face, stomach and other regions of the body by the use of fists of the detective.

13. After more than an hour of beating and threatening me with being electrocuted I agreed to confess.

Supplemental Affidavit of Willie Richardson.

14. The detectives wrote the confession, without consulting me. When they had finished one of the read it to me and I signed it.

15. I signed the confession in order to stop the beating. Also, without the aid of an attorney I was afraid that I might be electrocuted. I did no know what else to do.

16. After I had been indicted for first degree murder, Mr. Alfred Rosner was assigned to represent me.

17. Mr. Rosner came to see me either the last week of June or the first week of July, 1963. His entire visit lasted approximately 10 minutes. He asked me what happened, but did not take any notes. He told me that he would get paid the same amount of money for representing me regardless of the outcome. He did not mention what he intended to do to help me or prepare my case.

18. The next time that I saw Mr. Rosner was on July 22, 1963 when I was taken to court.

19. Since I had already pleaded not guilty to first degree murder I thought that my appearance in court had something to do with this.

20. My attorney did not come to see me while I was waiting in the detention room in the courthouse. The first time that I saw Mr. Rosner, since he had visited me in jail, was when I was taken to the courtroom.

21. During the three or four minutes before the proceeding began Mr. Rosner informed me, for the first time, that I should change my plea of not guilty to first degree murder to guilty of second degree murder.

22. I immediately protested. I attempted to explain to Mr. Rosner that I did not want to plead guilty to something

which I had not done. I told him that a confession was taken from me solely because I was afraid, the beatings were painful and I did not know what else to do. Mr. Rosner told me that this was not the proper time to bring up the confession.

23. Mr. Rosner explained to me that if I went to trial and the confession was used I could get the electric chair. I told him that this was the chance which I would have to take because I was not guilty.

24. Mr. Rosner then explained that I would be foolish to risk my life this way. He told me that the best thing for me to do plead to the charge of second degree murder, thereby saving my life, and then I could later explain by a writ of habeas corpus how my confession had been beaten out of me.

25. Mr. Rosner also explained to me that the District Attorney, Mr. Hogan, was an extremely tough man and that he would be in court later.

26. It was at this point that I decided to go along with the change of plea. I felt that if my own attorney told me that the confession would in all probability get me the electric chair; and also told me that I could attack the confession later without risking my life, then I had better go along.

27. I did not plead guilty because I had committed the crime.

Respectfully submitted,

Original signed by
WILLIE RICHARDSON

Original notarized on
January 15, 1968
By William E. Donahue

Affidavit of Alfred I. Rosner.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ALFRED I. ROSNER, being duly sworn, deposes:

I am an attorney and counselor at-law, duly admitted, on January 9, 1928, to practice in all the courts of the State of New York, with offices at 280 Broadway, N. Y. 7, N. Y.

That heretofore on April 11, 1963, the above-named defendant Willie Richardson was indicted on two counts of Murder in the first degree. Upon arraignment, on April 16, 1963, under said indictment, the defendant appeared without counsel, and when he was asked by the Court whether he desired the aid of counsel he replied that he did. He thereupon signed an affidavit in which he stated that he was wholly destitute of means with which to employ counsel to defend him upon the trial of the said indictment or to pay such incidental expenses as might be incurred in the conduct of his defense, and requested the court to assign counsel to him. Thereupon, on April 19, 1963, Honorable Mitchell D. Schweitzer, one of the Justices then presiding in Part 30 thereof, duly made and entered an order assigning your deponent, Alfred I. Rosner and William P. McCooe of 5 Beekman Street, N. Y. 7, N. Y., as counsel for the defendant upon the trial of the said indictment. A copy of said order is annexed hereto as "Exhibit A" and made part hereof.

That pursuant to said assignment your deponent filed a Notice of Appearance on behalf of himself and co-counsel; and filed a notice with the Warden of Tombs Prison on April 19, 1963. He learned that on April 11, 1963, the defendant had been committed for observation to Bellevue Hospital by Judge Michael J. Sherwin of the Criminal Court.

Counsel read the Indictment and then located the Felony Court complaint and the defendant's criminal record and

made copies of the same; and thereafter discussed same with co-counsel.

On April 24, 1963, a copy of the Indictment was obtained and the pleading adjourned a number of times, each time at the request of the Bellevue psychiatrists. On each of the adjourned dates both counsel appeared in court on behalf of defendant.

On June 20, 1963, deponent received a copy of the Medical Report in which defendant was found not insane. Counsel discussed this report with each other and sought outside advice pertaining thereto. They also studied the law dealing with the subject of Insanity. In addition counsel studied the law pertinent to the particular issues to be litigated, including the application of the law dealing with a two stage trial in cases of murder in the first degree.

On June 27, 1963, the defendant on his arraignment pleaded Not Guilty with a specification of Insanity, and requested time until August 2, 1963 to make motions.

Counsel had conferences with defendant and with each other relative to preparation for trial as well as relative to the advisability of obtaining and taking a compromise plea.

On July 22, 1963, the case appeared on the trial calendar in Part 34, before Justice George Postel. The case was discussed with the Assistant District Attorney, Mr. McKeever, who offered to allow defendant to plead guilty to the indictment and receive a life sentence. Counsel declined this offer. Thereafter with the aid of the Court, the defendant, on recommendation of the District Attorney (through Mr. McKeever) was permitted to plead guilty to murder in the second degree under the first count of the indictment, such plea to cover all counts of the indictment. Sentence was set for September 27, 1963, then changed to September 25, 1963, then to October 9, 1963. Counsel also interviewed defendant after the entry of the plea.

Thereafter on September 25, 1963, the defendant was sentenced by Justice George Postel for a term of 30 years to life in State Prison.

WHEREFORE, your deponent respectfully requests that the Court grant the annexed order allowing deponent and his co-counsel reasonable compensation for their services rendered herein as counsel on behalf of the defendant Willie Richardson in this action.

No previous application had been made for an allowance for services rendered herein.

ALFRED I. ROSNER.

(Sworn to by Alfred I. Rosner on September 9, 1963.)

Affidavit of William P. McCooe.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM P. McCOOE, being duly sworn deposes:

That he is an attorney and counselor at-law of the State of New York, and has his office at 5 Beekman St., N. Y. 38.

That he has read the annexed affidavit of Alfred I. Rosner and the same is true to his own knowledge and the services set forth therein were actually rendered on behalf of the defendant, Willie Richardson, by your deponent and Alfred I. Rosner.

WHEREFORE, your deponent respectfully prays that the annexed Order of Compensation be granted.

WILLIAM P. McCOOE.

(Sworn to by William P. McCooe on October 9, 1963.)

United States Court of Appeals' Order of Reversal.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of February, one thousand nine hundred and sixty-nine.

Present:

HON. LEONARD P. MOORE,
HON. PETER WOODBURY,
HON. J. JOSEPH SMITH,
Circuit Judges.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for a hearing to develop all the facts with directions that the hearing be transferred to the United States District Court for the Southern District of New York and shall be held with all reasonable expedition before one of the Judges of said District Court, and for

further proceedings in accordance with the opinion of this Court.

It is further ordered, adjudged and decreed that John T. Baker, Esquire, 52 Vanderbilt Avenue, New York City, New York 10017 be and he hereby is assigned to represent the appellant on the hearing.

/s/ A. DANIEL FUSARO,
Clerk.

Circuit Court Opinions—Ross and Dash.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

September Term, 1967.

(Submitted to the court *in banc* October 17, 1968 Decided February 26, 1969.)

No. 492—Docket No. 32140

Before:

LUMBARD, Chief Judge,
WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN HAYS, ANDERSON and FEINBERG, *Circuit Judges.*

United States ex rel. Ross v. *McMann* was argued May 9, 1968 before Lumbard, *Chief Judge*, and Smith and Anderson, *Circuit Judges.*

United States ex rel. Dash v. *Follette* was argued on June 21, 1968 before Moore and Friendly, *Circuit Judges*, and Bryan, *District Judge*.

Since similar issues of importance in determining state prisoner habeas corpus applications were involved in these cases, and in No. 32264, *United States ex rel. Oscar Leon Rosen* v. *Follette*, the court on October 17, 1968 ordered the three cases considered *in banc*.

Appeal in *United States ex rel. Ross* v. *McMann* from judgment of the United States District Court for the Eastern District of New York, Walter Bruchhausen, *Judge*, dismissing without hearing application of state prisoner for writ of habeas corpus. Reversed and remanded.

THOMAS D. BARR, New York, N. Y. (Duane W. Krohnke, New York, N. Y., on the brief), *for relator-appellant*.

JOEL LEWITTES, Asst. Attorney General, State of New York (Louis J. Lefkowitz, Attorney General, and Samuel A. Hirshowitz, First Asst. Attorney General, on the brief), *for respondent-appellee*.

Appeal in *United States ex rel. Dash* v. *Follette* from order of the United States District Court for the Southern District of New York, John M. Cannella, *Judge*, denying

without hearing petition of state prisoner for writ of habeas corpus. Reversed and remanded.

GRETCHEN WHITE OBERMAN, New York, N. Y. (Anthony F. Marra, New York, N. Y., on the brief), *for petitioner-appellant.*

MORTIMER SATTLER, Asst. Attorney General, State of New York (Louis J. Lefkowitz, Attorney General, and Samuel A. Hirshowitz, First Asst. Attorney General, on the brief), *for respondent-appellee.*

SMITH, *Circuit Judge* (with whom Judges Waterman, Kaufman, Hays, Anderson and Feinberg concur):

United States ex rel. Ross v. *McMann* is an appeal from a dismissal without hearing of an application by a state prisoner for writ of habeas corpus in the District Court for the Eastern District of New York, Walter Bruchhausen, *Judge*. Relator, confined in a New York State prison for a term of 45 years to life on conviction upon plea of guilty to murder in the second degree, petitioned the Supreme Court of the State of New York for Kings County for a writ of error *coram nobis* on the ground that his guilty plea was induced by coerced confessions. The writ was denied without a hearing, the decision affirmed without opinion by the Appellate Division, *People* v. *Ross*, 272 N.Y.S. 2d 969 (2d Dept. 1966) and leave to appeal denied by the New York Court of Appeals.

The District Court entertained the application for writ of habeas corpus, and dismissed the petition without a hearing on the ground that "a voluntary guilty plea en-

tered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings against him," relying on *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018 (2 Cir. 1965), cert. denied 383 U. S. 915 (1966). In his complaint and supplemental affidavit Ross alleges that he pleaded guilty because his attorney had refused to attempt to suppress a confession which had been illegally obtained from him and had warned him that if he risked a trial, the confession and other evidence against him would surely lead to his conviction for first degree murder and sentence to the electric chair.[1] We hold that

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[1] Judge Bruchhausen in his opinion recited some of Ross' allegations, including the following:

"In May, 1954, while in State custody, the relator was taken to the office of the District Attorney and questioned about the commission of a murder; he was coerced into signing a statement, confessing the crime; his request to be permitted to consult with his attorney was refused and he was not advised of his right to remain silent;

"In October, 1954, he was arraigned on an indictment, charghim with the commission of first degree murder;

"Five or six weeks later, he requested his court appointed lawyer, Mr. Harvey Strelzin, to seek the return of the confession; Strelzin urged that no such action be taken; if he persisted in demanding a trial, Mr. Jenkins, a witness for the People would testify against him and he would get the chair;

"In February, 1955, he was brought into court, represented by counsel, and informed that the District Attorney was willing to accept a plea to second degree murder and that his sentence would be twenty years to life; he thereupon pleaded guilty to that charge;

"March 14, 1955, judgment of conviction was entered, including a sentence of forty-five years to life";

Among other allegations by Ross was the following:

"13. Sometime later he visited me again; I would say it was five or six weeks afterward, but I cannot be certain with greater specificity. I asked him then 'to get my confession back.' I recall those to have been my exact words. I meant that I wanted to repudiate the confession and have it suppressed. I

(*footnote continued on following page*)

these allegations raise a sufficient question as to the voluntariness of the plea of guilty to require a hearing before the issue is determined.

On the record before us, it appears that Ross has sufficiently raised his present claims in the state courts to satisfy the requirement of exhaustion of state remedies. On oral argument, however, it was represented that a second petition by Ross for relief by writ of error *coram nobis* has been brought to and is pending in the state courts.

(*footnote continued from previous page*)

spoke in the belief that it could be done in some way. He told me that that was completely out of the question and that at any rate the District Attorney had the gun, that nothing had changed, that Jenkins would tell his story to the jury, and that his testimony, backed up by the confession and the gun, would be enough to make 'a jury of twelve cousins' convict me and send me to the electric chair. He told me that he would 'get the first possible break' for me from the District Attorney, but that I 'would be dead by the Fourth of July' if I risked a trial.

"14. When I was brought to Court in February of 1955, Mr. Strelzin came in to see me while I was in the detention cell. I asked him again about repudiating and suppressing my confession; this seemed to exasperate him because he spoke sharply about having gone all through that before and that I had better listen to him because *he* was my lawyer and not those convicts in Raymond Street who would all be in Sing Sing in six months with all the law they knew. I told him I had not asked him on the basis of anything anyone had told me. He seemed to grow calmer at that. He told me he had spoken to the District Attorney, who was willing to allow me to plead to second degree murder, and I would get twenty years to life; he said it was an 'or else' offer, that I knew the evidence the District Attorney could present against me. He said that things were no better than before and, if anything, were much worse; the District Attorney had the confession, the gun, and Jenkins, who could be expected to tell any story to help himself. If I insisted on going to trial, well, he was my lawyer and would do what he could, though that couldn't amount to very much because 'there isn't a pair in the world to beat four aces.' Twenty to life was a long time, he wasn't going to argue that it wasn't; but it had to be better than the electric chair."

If this is determined by the District Court to be the fact, that court may defer hearing in this matter pending final determination of the action in the state courts. And, if hearing is had on the issue in the state courts, the District Court may find further hearing before it unnecessary to its determination of the merits. We reverse and remand to the District Court for further proceedings not inconsistent with this opinion.

This case raises the narrow question whether a District Court should apply the standards of *Townsend* v. *Sain*, 372 U. S. 293 (1963), in determining whether to hold an evidentiary hearing upon a habeas corpus petition where the petitioner is confined after a plea of guilty and is contending that the plea was not voluntary, because it was induced by the existence, or threatened use, of an allegedly coerced confession.

It is clear, first of all, that a plea of guilty, even where the defendant is represented by counsel, is not an absolute bar to collateral attack upon a conviction. *Waley* v. *Johnston, Warden*, 316 U. S. 101 (1942). Cf. *Pennsylvania ex rel. Herman* v. *Claudy, Warden*, 350 U. S. 116 (1956). (In *Herman*, petitioner did not have benefit of counsel.) See also *Machibroda* v. *United States*, 368 U. S. 487, 493 (1962): "A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack." To paraphrase *Harrison* v. *United States*, 392 U. S. 219, 223 (1968), "The question is not *whether* the petitioner made a knowing decision to [plead] but *why*." Nor is the mere existence of a coerced confession enough to invalidate a later guilty plea by a defendant represented by counsel.

The question to be answered in any case involving a collateral attack on a conviction based upon a plea of guilty

is usually expressed in terms of whether or not the plea was a "voluntary" act. [An "involuntary" plea of guilty is inconsistent with due process of law, see *Waley* v. *Johnston, supra,* 316 U. S. at 104, and thus invalid whether made in federal or state court.] And *Townsend* v. *Sain, supra,* 372 U. S. at 312-13, requires that where the petitioner in such a case has not received a "full and fair evidentiary hearing" in a state court as to the voluntariness of the plea, a hearing be held in the federal District Court.

The question of when to hold a hearing has apparently been complicated in this Circuit, however, by confusion between the doctrine that an involuntary guilty plea may be collaterally attacked and the well-established doctrine that *if* the plea *is* voluntary, it is an absolute waiver of all non-jurisdictional defects in any prior stage of the proceedings against the defendant.

Judge Weinfeld said in *United States* v. *Colson,* 230 F. Supp. 953, 955 (S.D.N.Y. 1964), "The determination of the ultimate question of whether the defendant, at the time he pled guilty, had the free will essential to a reasoned choice, rests upon probabilities and, of course, cannot be resolved with mathematical certainty. It involves an evaluation of psychological and other factors that may reasonably be calculated to influence the human mind . . . [I]t is necessary to consider the plea of guilty against the totality of events and circumstances which preceded its entry." The determination is difficult, but it is not necessarily rendered more difficult simply because a coerced confession or an illegal search and seizure is one of the factors which may be taken into account.

In the case at bar, the court, relying on *Glenn,* found it unnecessary to make such a determination. This, we think, resulted from a too expansive reading of *Glenn.* The opin-

ion in *Glenn* may be read either of two ways: (1) the allegation of a coerced confession, *without more*, is not sufficient to raise the issue of the voluntariness of a guilty plea; or (2) an unconstitutionally coerced confession is never relevant to the issue of the voluntariness of a guilty plea. The first, more narrow reading, seems to us to state the proper rule. But the second reading (the much more likely meaning of the opinion despite the use of the word "voluntary," in view of the allegation that the plea was *coerced by the existence of* an involuntary confession) confuses the doctrine that an involuntary guilty plea may be collaterally attacked with the doctrine that if it is voluntary, a guilty plea waives prior defects in the proceedings against the defendant.

The court relied on two cases in *Glenn: United States ex rel. Swanson* v. *Reincke*, 344 F. 2d 260 (2 Cir. 1965), cert. denied 382 U. S. 869, and *United States ex rel. Boucher* v. *Reincke*, 341 F. 2d 977 (2 Cir. 1965). Neither of those cases holds that the waiver rule should operate to make an invasion of the defendant's Constitutional rights irrelevant to the issue of the voluntariness of the guilty plea.

In *Swanson*, this court affirmed the denial of relief in a habeas corpus proceeding challenging the constitutionality of the statute under which petitioner had been convicted, where a hearing had been held below. There is language in the court's opinion refusing to rest affirmance on the ground that a plea of guilty should bar collateral attack. In discussion of that issue, 344 F. 2d at 261-62, it was said:

> 'The cases most nearly in point but by no means exactly so concern guilty pleas proper in other respects, such as right to counsel, but lodged after the police had obtained evidence in violation of constitutional rights; a number of circuits have said such

> guilty pleas are not subject to attack [citing cases], even when induced by that evidence [citing cases].[2]

In *Boucher*, the other case cited in *Glenn*, the petitioner sought to attack his conviction based upon a guilty plea. After stating the waiver rule, this court said:

> To circumvent the effect of the guilty plea as a waiver, the petitioner asserts that his plea was induced by inadequate representation by counsel and by the fear that unconstitutionally obtained evidence would be used at his trial.

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[2] The cases cited in the quoted discussion in *Swanson* are the following: *Gonzalez* v. *United States*, 210 F. 2d 825 (1 Cir. 1954) (denial of motion to vacate judgment affirmed where conviction based on guilty plea and motion based *solely* on the ground that evidence had been unconstitutionally seized); *Hall* v. *United States*, 259 F. 2d 430 (8 Cir. 1958), cert. denied 359 U. S. 947 (1959) (denial of motion to vacate sentence affirmed where the allegation was of confession after "four hours of intensive interrogation without legal advice or counsel," but there was a *finding in the District Court* that there was a "free and voluntary" plea of guilty); *Watts* v. *United States*, 278 F. 2d 247 (D. C. Cir. 1960) (denial of Sec. 2255 motion to vacate sentence affirmed, where the motion was based on the ground that police used appellant's co-defendant's confession to induce him to confess and then to plead guilty, but *upon a full hearing in the District Court it was found*, on ample evidence, that the guilty plea was "competently, voluntarily, and intelligently entered"—the statement, picked up out of context in the West's headnote, that collateral attack on the plea of guilty would not lie, reads in full, 278 F. 2d at 250: "Finally, at the hearing we ordered, appellant frankly admitted his guilt. On this record collateral attack would not lie."); and *United States ex rel. Staples* v. *Pate*, 332 F. 2d 531 (7 Cir. 1964) (dismissal of petition for habeas corpus affirmed, where petitioner contended that his plea of guilty did not waive prior police misconduct—alleged illegal search—which "induced" his plea, but the *District Court found after a hearing* that petitioner was not entitled to a writ, and the Court of Appeals noted three times that there was no evidence presented at the hearing that the plea was not voluntary).

341 F. 2d at 981. The opinion then goes on to explain how the petitioner's representation by counsel had been entirely competent, there were no circumstances indicating an illegal search and seizure, and "There is not a shred of evidence that anyone induced him to plead guilty and the court concluded 'it was made freely, voluntarily and intelligently.'" A hearing was held in *Boucher*.

The meaning of the rule was also left somewhat uncertain by a *per curiam* opinion in *United States ex rel. Martin* v. *Fay*, 352 F. 2d 418 (2 Cir. 1965), cert. denied 384 U. S. 957 (1966). There, a denial without a hearing of an application for habeas corpus was affirmed, where appellant claimed, *inter alia*, that he pleaded guilty because a coerced confession had been obtained from him. The court said: "An examination of the facts and circumstances surrounding the taking of the plea convinces us that the plea was made voluntarily, the colloquy between the sentencing judge and appellant being decisive." The court then cited the waiver rule, as stated in *Glenn*, along with a "see also" citation to *Swanson* and *Boucher*. Judge Waterman concurred on the gound of failure to exhaust state remedies, and stated that he thought the court had made an ambiguous use of the word "voluntary," since although the petitioner had not demonstrated that a hearing would prove his allegation that his guilty plea was "required by an alleged prior forced confession," "Nevertheless, I can conceive of situations in which a plea of guilty upon the advice of counsel would have been caused by circumstances entitling the defendant to challenge his own act on the ground it was a compelled act." 352 F. 2d at 419.

We have in other cases also used language inconsistent with the District Court's reading of *Glenn* here. In *United States ex rel. Siebold* v. *Reincke*, 362 F. 2d 592 (2 Cir. 1966), a denial of a petition for a writ of habeas corpus was affirmed *per curiam* on the ground that "the hearing

before the District Court indicated that petitioner's guilty plea was not the result of unconstitutionally obtained evidence." 362 F. 2d at 593. In the course of the opinion, it was noted that "A conviction will not be sustained if it rests upon a plea of guilty which is the result of coercion, nor, perhaps, if the plea of guilty resulted from other violations of constitutional rights," citing *Vaughn, supra,* and *United States ex rel. McGrath* v. *La Vallee,* 319 F. 2d 308, 311 (2 Cir. 1963). Neither *Glenn* nor *Martin* was mentioned. In *McGrath,* the court split three ways (for no hearing, a hearing, and outright granting of a writ of habeas corpus) in a case where petitioner contended that his guilty plea had been involuntary—the claim of coercion was based upon what the trial judge said to the petitioner just before the guilty plea was entered.

The rule should be stated as follows: Where a petition for habeas corpus raises a claim that a guilty plea was not voluntary, the standards of *Townsend* v. *Sain* are applicable in determining whether to hold a hearing; and although the waiver rule means that an allegation that the petitioner's constitutional rights were violated before the plea was taken is not, standing alone, sufficient to call the validity of the plea into question, nonetheless if it is alleged that the plea was coerced in a manner spelled out in the petition, the alleged violations are not irrelevant to the issue of the voluntariness of the plea. An alleged violation of constitutional rights is simply another factor to be taken into account in determining the voluntariness of the plea.

On the other hand, the fact that the petitioner was represented by counsel and acted after consultation with counsel is also to be given substantial weight in determining the issue of voluntariness of plea.

From and after *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), the state and federal courts have stressed the value and necessity of providing an accused with counsel because, except in the very few cases of inadequate representation,

the professional skill and judgment of the attorney, exercised on his client's behalf, affords the accused protection of his rights. The role of the attorney in advising a plea of guilty should not, therefore, be ignored. Even where there is evidence that a confession has been coerced, there may be factors which would justify counsel for the accused, once a fair hearing by the state court has been held on a motion to suppress the confession and suppression has been denied, to advise a plea of guilty. Therefore, a mere conclusory allegation by a prisoner without more, that the existence of a coerced confession induced his guilty plea, in the absence of any particularized allegations as to how that confession rendered his plea involuntary, should not ordinarily be considered sufficient to predicate an order for a hearing.[3] See *United States ex rel. White* v. *Fay*, 349 F. 2d 413 (2 Cir. 1965); *United States ex rel. Homchak* v. *New York*, 323 F. 2d 449 (2 Cir. 1963), cert. denied 376 U. S. 919 (1964).

The rule we have set out is apparently consistent with the views of at least the Third, Fifth, Sixth, Seventh, and Ninth Circuits. See *United States ex rel. Collins* v. *Maroney*, 382 F. 2d 547 (3 Cir. 1967) (*per curiam*); *Smith* v. *Wainwright*, 373 F. 2d 506 (5 Cir. 1967); cf. *Carpenter* v. *Wainwright*, 372 F. 2d 940 (5 Cir. 1967), a stronger case for the petitioner; *Reed* v. *Henderson*, 385 F. 2d 995 (6 Cir. 1967), dictum: "Appellant apparently attempts to circumvent the waiver attending the plea of guilty by claim-

[3] To enable the district court to decide whether or not a hearing should be ordered, additional supporting material such as the affidavit of the attorney who represented the petitioner when he entered the guilty plea, or exhibits, or affidavits of persons having knowledge of the claimed facts, should be appended with the petitioner's own affidavit, to the original petition filed with the district court. In this case, however, we are satisfied from the petitioner's affidavit alone that he is entitled to the requested hearing.

ing that the plea was involuntary in that it was the product of, or induced by, certain coerced admissions which had been obtained from him by the police. That this may be a ground for habeas corpus relief appears to be well settled," 385 F. 2d at 996; *Shelton* v. *United States,* 292 F. 2d 346 (7 Cir. 1961), cert. denied 369 U. S. 877 (1962); *Doran* v. *Wilson,* 369 F. 2d 505 (9 Cir. 1966).

To sum up: *Glenn* says, in effect, that a "voluntary" plea of guilty wipes out all prior invasions of the defendant's constitutional rights. Whether that is correct or not depends on the meaning of "voluntary"; it must be recognized that a prior invasion of the defendant's rights, even if not sufficient after the taking of the plea to overturn the conviction, may still be entirely relevant to the issue of the plea's voluntariness. The problem is that *Glenn,* together with *Martin,* is sometimes being read by the District Courts to say that a coerced confession or other violation of a defendant's rights is *never* relevant to the issue of voluntariness, and in these cases the District Courts are relying upon representation by counsel and proper questioning by the judge at the plea taking to establish voluntariness without more, even where the allegations of the habeas corpus petition raise questions which cannot be answered by reference to the transcript alone.

This court has recently discussed the reasons why the voluntary guilty plea constitutes a waiver of all non-jurisdictional defects, *United States ex rel. Rogers* v. *Warden of Attica State Prison, supra,* 381 F. 2d 209 at 213 (2 Cir. 1967):

> There is nothing inherent in the nature of a plea of guilty which *ipso facto* renders it a waiver of a defendant's constitutional claims. Rather, waiver is presumed because ordinarily such a plea is an indication by the defendant that he has deliberately failed or refused to raise his claims by available state pro-

cedures; therefore, principles of comity and the interests of orderly federal-state relations require that he should not be allowed to present these claims to the federal courts.

A distinguishing feature of the present case, however, is that the only available state procedure by which he could contest the validity of the confession was the one declared retroactively unconstitutional in *Jackson* v. *Denno*, 378 U. S. 368 (1964). This is even more damaging to an accused than the lack of a right to appeal the intermediate order denying the Fourth Amendment motion to suppress in *Rogers*, *supra*, *p.* 214.

Faced with that hazard as his only alternative recourse, made particularly perilous in the context of the first degree murder charge with a possible death penalty, the decision of the accused, on advice of counsel, to plead guilty to second degree murder might well be held to have been involuntary. The petitioner cannot be deemed to have waived his coerced confession claim by deliberately by-passing state procedures when the state failed to afford a constitutionally acceptable means of presenting that claim, and he cannot be deemed to have entered a voluntary plea of guilty if the plea was substantially motivated by a coerced confession the validity of which he was unable, for all practical purposes, to contest.

The judgment is reversed and the case remanded with instructions to hear and determine petitioner's application unless a hearing is held by the courts of the state determining under the standards set forth herein the issue of the voluntariness of petitioner's plea[4] within 60 days from the

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[4] The conviction would stand, of course, if the state court found after full and fair evidentiary hearing, either that the confession was voluntary or that the plea was not substantially motivated by the confession.

date of issuance of the mandate herein, or such further time as the District Court may for good cause allow.

Turning to *United States ex rel. Dash* v. *Follette*, Foster Dash was sentenced on August 3, 1959, in the New York state courts on plea of guilty to a charge of robbery second degree, to imprisonment for a term of 8 to 12 years as a second felony offender. Dash sought release by writ of error *coram nobis* on the ground that a false confession was obtained from him after indictment in violation of his right to counsel, and that his plea of guilty was induced by advice of counsel that the confession would negate any chance of acquittal and by a threat by the trial judge that he would receive the maximum possible sentence if he went to trial and was found guilty. The writs were denied without hearing, and the orders affirmed by the Appellate Division (21 A. D. 978) and by the Court of Appeals (16 N. Y. 2d 493, 260 N.Y.S. 2d 437 (1965)), two justices dissenting.

Petitioner then applied for writ of habeas corpus, alleging similar grounds, in the United States District Court for the Southern District of New York. The Court, John M. Cannella, *J.*, denied the application, relying principally on *United States ex rel. Glenn* v. *McMann*, *supra*, *United States ex rel. Swanson* v. *Reincke*, *supra*, and *United States ex rel. Boucher* v. *Reincke*, *supra*,[5] and petitioner appeals. We reverse and remand with instructions.

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[5] The District Court summarized the record before it as follows:

"Petitioner alleges: (1) that his plea of guilty was the product of a coerced confession, (2) that his plea of guilty was coerced by the trial court by telling him he would get the maximum penalty if found guilty after trial.

"In regard to the first contention, it is well settled that a voluntary plea of guilty entered on advice of counsel constitutes a waiver of all nonjurisdictional defects in any prior stage of

(*footnote continued on following page*)

In this case, as in *United States ex rel. Ross* v. *McMann*, decided herewith, a state prisoner's application for writ of habeas corpus was denied without hearing, the court relying largely on *United States ex rel. Glenn* v. *McMann*, since the petitioner, represented by counsel, had pleaded guilty in the state court. Here Dash alleges coercion of his confession. (Conviction of two of his co-defendants who went to trial was set aside because it was held that their confessions were coerced. *People* v. *Waterman*, 12 A. D. 2d 84, aff'd 9 N. Y. 2d 561 (1961).) He also alleges coercion of his plea, relying partly on the existence and threatened use of his coerced confession, and partly on an alleged threat by the judge to impose the maximum possible sentence if he were found guilty after a trial. The latter ground was dismissed from consideration by the judge because the report of the state court proceeding, *People* v. *Dash*, 16 N. Y. 2d 493 (1965), indicated that the prosecutor had filed an affidavit categorically denying that the trial judge ever threatened the defendant.

In this case, as in *Ross* v. *McMann*, the claim is made that the existence of a coerced confession, in a case determined prior to *Jackson* v. *Denno*, *supra*, so tainted the

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(*footnote continued from previous page*)

the proceedings against the defendant. *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018 (2d Cir. 1965); *United States ex rel. Swanson* v. *Reincke*, 344 F. 2d 260 (2d Cir. 1965); *United States ex rel. Boucher* v. *Reincke*, 341 F. 2d 977 (2d Cir. 1965). Petitioner therefore cannot succeed on the basis of his first contention.

"With respect to the second contention it appears that the prosecutor in the state court proceedings filed an affidavit in which he categorically stated that the trial judge never threatened the defendant. See, *People* v. *Dash*, 16 N. Y. 2d 493 (1965).

"Further, the transcript relating to the entry of petitioner's plea of guilty clearly indicates that the defendant made an intelligent and uncoerced choice and that no promises or threats were made to him."

state court proceedings that the plea was not voluntary. For the reasons set forth in *Ross* v. *McMann,* we think the allegations here sufficient to call for a hearing on the voluntariness of the plea unless a full hearing and determination of the issue is provided in the courts of the state. As we held in *Ross,* "The petitioner cannot be deemed to have waived his coerced confession claim by deliberately by-passing state procedures when the state failed to afford a constitutionally acceptable means of presenting that claim, and he cannot be deemed to have entered a voluntary plea of guilty if the plea was substantially motivated by a coerced confession the validity of which he was unable, for all practical purposes, to contest." In these circumstances there is an issue as to the motivation of the plea which cannot be resolved without a hearing. If it was motivated by the claimed threat of the judge, or the existence and threatened use of a coerced confession, it may be found not to have been voluntary. On the other hand, if it is found that there was no such threat by the judge, and if the plea was freely made on advice of counsel because of the weight of the state's case aside from the confession, with apparent likelihood of conviction regardless of the confession, in a considered effort to obtain a lighter sentence, the court may find the plea voluntary, and the conviction unassailable.

Reversed and remanded with instructions to hear and determine petitioner's application unless a hearing is held by the courts of the state determining under the standards set forth herein the issue of the voluntariness of petitioner's plea[6] within 60 days from the date of issuance of the

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[6] The conviction would stand, of course, if the state court found after full and fair evidentiary hearing, either that the confession was voluntary and there was no threat by the judge, or that the plea was not substantially motivated by the confession or by the alleged threat of the judge.

mandate herein, or such further time as the District Court may for good cause allow.

WATERMAN, *Circuit Judge,* concurring:

I concur in the opinion for the majority of the *in banc* Court written by Judge Smith.

I accept Judge Kaufman's approach in his concurring opinion, and I concur in that opinion, also.

SRW

KAUFMAN, *Circuit Judge,* concurring (with whom Judges Waterman, Anderson and Feinberg concur):

I am in full accord with my brother Smith's opinion.

Because we are not writing on a clean slate, and the majority accordingly came to the only conclusion open to it in *Ross* and *Dash,* I feel impelled to respond to the objections raised by my dissenting brothers.

Notwithstanding the caustic tones in which one of them has reported I believe it my responsibility to set forth my views lest one believe that only the dissenters seek to protect us "against those who have made it impossible to live today in society" *Harrison* v. *United States,* 392 U. S. 219, 235 (1968) and that the majority has become an ally of criminals, devoid of all interest in the community's safety and living insensitively in its ivory tower.

First, I should hardly have thought it necessary, but for my brothers' dissent, even to mention the judicial precept that the ultimate guilt or innocence of the defendants has no bearing on the issues before us. Under our system of criminal justice two indispensable conditions must be met to render valid a determination of guilt: not only must the accused actually be guilty of the crime for which he was convicted, but the procedure leading to his conviction

must comport with the requirements of due process. Thus, even if we were to agree with my dissenting brother's declamation that "Men who first confess and then, on the advice of counsel, plead guilty to serious crimes, do so because they are," I submit that such an observation is gratuitous and irrelevant to the issue before us: whether the state procedures leading to the entry of the pleas of guilty in question were fundamentally fair in a constitutional sense.

Second, I am impelled to dissipate the impression that our decision is somehow a novel departure from established constitutional tenets. On the contrary our decisions here are absolutely required by the principles the Supreme Court has long enunciated. Thus, in *Machibroda* v. *United States,* 368 U. S. 487, 493 (1962), the Court cautioned:

> ". . . A plea of guilty differs in purpose and effect from a mere admission or extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime courts should be careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." [quoting *Kercheval* v. *United States,* 274 U. S. 220, 223 (1927)].

This instruction of the Court cannot be ignored merely because the particular facts of that case are somewhat different from those in the cases before us, or because non-essential distinctions might be spun. If we could turn our backs on a pronouncement as clear as that quoted merely because the facts in the case under consideration may not be on all fours, no precept or *ratio decidendi* of the Supreme Court would have any force. It does not require

too much imagination to recognize that the principles and the problems we are dealing with are the same. *Machibroda* mandated that, because of the extreme gravity of a guilty plea, in *all* cases where a conviction based upon such a plea is attacked we must *carefully* and conscientiously consider the surrounding circumstances to determine whether it was properly and voluntarily made. And since *Machibroda* itself involved a collateral attack on a conviction based upon a guilty plea we cannot, as one of my dissenting brothers suggests, ignore the applicability of this mandate to other cases where post conviction attacks are made on the propriety of the guilty pleas merely because they come "long after the defendant has gotten the benefit of his bargain."

Moreover, in *Herman* v. *Claudy*, 350 U. S. 116, 118 (1956), the Court further instructed:

> ". . . [A] conviction following trial *or on a plea of guilty* based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause." [Italics added.]

While the petitioner in *Herman* alleged a more aggravated deprivation of rights than appears in the cases before us, such a distinction is not compelling. Although the court was dealing with a greater degree of contamination, I do not read *Herman* as preaching a doctrine that the taint must reach only the gradations found there before one may claim the pleas were induced by fundamentally unfair procedures. If the Supreme Court had intended to limit the holding to the precise facts in that case it would have done so explicitly, or at least by intimation, a course it has followed in so many other cases where it desired to achieve such a limited goal. When instead the court enunciated a clear, unqualified, and unequivocal principle of general ap-

plicability, we, as an inferior court, are duty bound to regard it as governing in analogous cases presenting the same question of law. My brother Friendly made the point when he said in another context, "Our duty as an inferior federal court is to apply, as best we can, the standards the Supreme Court has decreed. . . ." *United States* v. *Motion Picture Film Entitled "I Am Curious-Yellow,"* Dkt. No. 32448 (2d Cir. decided November 26, 1968) (concurring opinion) at 3682 (holding the film not obscene), whether or not we would make the same pronouncements if free to do so.

Judges must be careful lest their personal predilections lead them to ignore the constitutional requirements set forth by the Supreme Court, by indulging in sophistic games of distinction-making because they do not approve of the Court's Constitutional determinations. In this instance we are buttressed in our interpretation of *Herman,* which one of my dissenting brothers pansophically dismisses as "a dismal failure," by the knowledge that many other federal circuit courts have also "failed" and read *Herman* precisely as we have. E.g., *Reed* v. *Henderson,* 385 F. 2d 995, 996 (6th Cir. 1967); *Smiley* v. *Wilson,* 378 F. 2d 144, 148 (9th Cir. 1967); *Bell* v. *Alabama,* 367 F. 2d 243, 246 (5th Cir. 1966), cert. denied 386 U. S. 916; *Jones* v. *Cunningham,* 297 F. 2d 851, 855 (4th Cir. 1962), cert. denied 375 U. S. 832 (1963). Indeed, in *United States ex rel. Vaughn* v. *LaVallee,* 318 F. 2d 499 (2d Cir. 1963), apparently overlooked, my able brother Lumbard endorsed *Herman* when, citing that case he remarked "A plea of guilty which is prompted by fear that unconstitutionally obtained evidence will be used at trial will not sustain a conviction." 318 F. 2d at 499.

Not only is the result of the majority following the only course left open to a lower court by the Supreme Court, but it is sound because, as the law must, it comports with

the realities of the situation. Consider for a moment the paradigm, where the prosecution has no other evidence against the defendant but the confession which it illegally obtained from him, and where, as in *Ross* and *Dash*, the defendant has no adequate means of challenging the confession prior to his trial. Under these circumstances it would be nothing less than fantasy for us to say that the existence of the confession could not have substantially motivated the plea. And if, in the more common case, the determination is more difficult because the prosecution also has other evidence against the defendant, I do not believe that such difficulty releases us from the obligation to consider the possibility that the existence of the confession had a substantial motivational effect. In reality we can never, as my brothers urge, escape deciding these cases, as distasteful as it might be. By refusing to consider them individually we merely decide they should all come out the same way—an approach hardly commendable or likely to reach a just result in those cases worthy of consideration.

Moreover, once we face up to the realities of the situation, the fundamental fallacy of my dissenting brothers' argument—that no coercion or untoward pressure of the *state* caused these pleas—becomes apparent. The state allegedly illegally obtained the confession from the defendant and the state denied him any adequate means of suppressing it prior to trial. How the state can then be transformed into a disassociated neutral observer when defendant pleads guilty because of that confession is too metaphysical for my comprehension. Once it has thus unfairly placed the defendant in an inherently coercive situation, I do not understand our solicitude for the state's claim that all pleas of guilty must under any and all circumstances be final, absolute and beyond judicial instruction.

Moreover, I must emphasize that, as the majority indicates in *Ross* we are by no means the first or only circuit to reach this result. Particularly in the Fourth Circuit, e.g., *White* v. *Papersack*, 352 F. 2d 470, 472 (1965); *Jones* v. *Cunningham*, *supra;* the Fifth Circuit, e.g., *Bell* v. *Alabama*, *supra;* and the Ninth Circuit, e.g., *Smiley* v. *Wilson*, *supra; Doran* v. *Wilson*, 369 F. 2d 505 (1966), the rule my dissenting brothers view as so novel and indeed unprecedented—that a guilty plea induced by the existence of an illegally obtained confession cannot stand —is well established law. And, we long ago embarked on the trying course of reviewing state convictions because the Supreme Court so decreed. See e.g., *U. S. ex rel. Caminito* v. *Murphy*, 222 F. 2d 698 (1955), cert. denied, 350 U. S. 896; *U. S. ex rel. Wade* v. *Jackson*, 256 F. 2d 7 (1958), cert. denied, 357 U. S. 908; *U. S. ex rel. Corbo* v. *LaVallee*, 270 F. 2d 513 (1959), cert. denied, 361 U. S. 950 (1960); where we found confessions coerced, despite jury findings to the contrary which had been accepted by New York Courts.

Finally, it would, in my view, be the rankest unfairness, and indeed a denigration of the rule of law, to recognize the infirmity of the pre-*Jackson* v. *Denno* procedure for challenging the legality of a confession in the case of prisoners who went to trial but to deny access to the judicial process to those who improperly pleaded guilty merely because the state would have more difficulty in affording a new trial to them. Nor do I believe that we are free to refuse to consider a valid claim for a hearing because the separation of meritorious claims from those of no merit is difficult. This "difficult" task is faced daily by judges; to avoid it by throwing out all petitions—even meritorious ones—because the chore is onerous would be an abdication of our judicial duty. The Supreme Court clearly stated in *Townsend* v. *Sain*, 372 U. S. 293 (1963) that where a state prisoner alleges facts which, if proved, would entitle him

to relief, he must be afforded a federal hearing on his habeas petition, where he has not received an adequate state hearing on the issue. And the Court has also held, repeatedly and emphatically, that where petitioner's allegations present an issue of fact not refuted by the files and records, we cannot deny him a hearing merely because his allegations are improbable. *Machibroda* v. *United States*, 368 U. S. 487, 494 (1962); *Waley* v. *Johnson*, 316 U. S. 102, 104 (1942); *Walker* v. *Johnson*, 312 U. S. 275, 285 (1941).

Although our decisions may encourage some prisoners to file petitions wholly devoid of merit, the short answer to this is that most advances in the law have been subject to abuse. But, if this were to deter courts from doing what should be done, the law would remain stagnant. Nor, do I share the belief that the mere filing of such petitions will overwhelm our experienced district judges. The trained judges' eyes can quickly sift out those not deserving of a hearing. It was not much of a task for the district judge and this Court to do just that with Rosen's petition. Indeed, the statistics of the Administrative Office of the United States Courts reflect that hearings in state habeas corpus cases between 1966 and 1968 have been granted in only about 8% of the approximately 5000 to 6000 applications filed each year during that period.[1] Moreover, we must not overlook the fact that pleas in the post-*Jackson* v. *Denno* era will not be affected by our ruling.

In any event, we have already recognized:

> "'There is an understandable tendency to try to avoid hearings . . . where it appears that there is little merit in the petition, and that hearing might well be of no avail to the petitioner. With the crowded dockets and

[1] Administrative Office of the United States Courts, Annual Report of the Director, 1966 and 1967, Tables C-3 and C-4. The information for 1968 is not yet published.

> delay caused by a heavy judicial workload, a diligent judge, out of concern for our goal of speedy justice, may well overlook the fact that a particular application alleges sufficient particulars to require a hearing. Our concern for efficiency must not outweigh our concern for individual rights. We cannot refuse a hearing because hearings generally show that there is no real basis for relief, or even because it is improbable that a prisoner can prove his claims." *United States* v. *Tribote,* 297 F. 2d 598, 603-04 (2d Cir. 1961).

A court of law whose function it is to guard against injustice cannot refuse access to those properly invoking its process merely because it must also deal with others who cry wolf too often.

Accordingly, I believe that when, as in *Ross* and *Dash,* a petitioner alleges facts sufficient to support his claim that his guilty plea was substantially induced by the existence of a confession illegally obtained from him which he had no adequate means of challenging, and his allegations are not controverted by the record, we cannot avoid our duty—time consuming as it may be—to grant him a hearing. Of course, we are not suggesting for a moment that the writ should be sustained after such hearing. The petitioner must carry the burden of establishing that the coerced confession substantially motivated him in pleading guilty. Thus, we are a long way from the house of horrors which the dissenting opinions suggest would confront us if a reprosecution were ordered. We do no more today than to determine that *all* petitions cannot be thrown out without regard to their merits merely because "no certain answers" can be given with the precision of a mathematical equation —a condition which the dissenters would seem to require. If this test had validity no court would ever inquire into the voluntariness of a plea of guilty or the voluntariness of a confession, for voluntariness is a purely subjective

action and never can "certain answers" be given by the fact finder. One of my dissenting brothers recognizes that "Absent some credible and detached *proof* to the contrary, we must assume that defendant's interests have been protected, and that pleas of guilty would not have been offered without substantial basis for believing [they] were guilty . . ." (Emphasis added.) Ross and Dash merely ask for the chance to give this *proof* at a hearing, which I cannot find any sound basis for denying in light of the allegations in their petitions.

ANDERSON, *Circuit Judge* (concurring):

I concur in the opinions of Judge Smith and Judge Kaufman.

FEINBERG, *Circuit Judge* (concurring):

I concur in the opinions of Judge Smith and Judge Kaufman.

LUMBARD, *Chief Judge*, dissenting (with whom Judges Moore and Friendly concur):

I would affirm the denials by the district courts of the petitions of these two state prisoners, Wilbert Ross and Foster Dash, for writs of habeas corpus.

In my opinion, these cases are governed by *United States ex rel. Glenn* v. *McMann*, 344 F. 2d 1018 (2d Cir. 1965), which held that "a voluntary guilty plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings." The conclusion that the guilty pleas in both of these cases were entered knowingly and without coercion is, to my mind, inescapable.

In each of these cases the state prisoner was represented by counsel long prior to the plea of guilty and there was

adequate time for full consideration of the case by the defendant and his counsel. Furthermore, it is apparent that the pleas were motivated by knowledge that the state had substantial evidence in addition to any confession it may have had from the defendants. In sum, it is altogether clear that the defendants, after consulting with counsel, made an informed, deliberate and voluntary choice that their interests would be best served by pleading guilty to a lesser degree of the crime charged and by the likelihood that the sentence the judge would impose would be less than if they were to stand trial and be convicted.

Nor do I think that *Jackson* v. *Denno,* 378 U. S. 368 (1964), should be applied to require a hearing in plea of guilty cases to determine whether the existence of the allegedly involuntary confession "coerced" the plea of guilty or whether the plea was taken for other reasons. I would confine *Jackson* v. *Denno* to cases where New York used the confession at trial, over objection that it was coerced, at a time when New York failed to provide a means of testing such objection prior to trial; it should not be given retroactive effect to cases where defendants pleaded guilty.

To say that a hearing might show these pleas to have been "involuntary" because they were induced by the fact that New York law, at the time of the pleas, provided that the voluntariness of confessions which the petitioners claim they made would be tested by the jury, is to indulge in profitless speculation and to embark upon an inquiry where no certain answers are possible. Even the holding of hearings in such cases will impose upon New York's judicial system, and in corresponding degree on the Federal system, a substantial burden and needlessly consume the time of assigned counsel, law enforcement officers, prosecutors, those judges who accepted the pleas and those judges who must now take time to hold the hearings.

For many years these cases had been concluded and forgotten. How can it be supposed more than 13 years after Ross' plea of guilty to second degree murder that there can be any reliable reconstruction of what the prosecution and defense knew about the nature and weight of the evidence available in 1955, or about the facts relevant to the "confession" and the state of mind of Ross at the time he pleaded guilty? While Ross has had time in prison to store up memories and imagine what happened in May 1954, when the murder occurred, and in 1955, when he pleaded guilty, the state's files of the case have been stored away and must be found if they can be. The prosecutor will have little, if any, memory of the case apart from what the file may disclose, and Ross' counsel, if he be available, may no longer have any files or any memory about the matter whatsoever.

Slim as are the chances of any reliable reconstruction of the situation as it bears on the 1955 plea, even slimmer are the chances of again prosecuting the case should the judgment of conviction based upon the plea of guilty be set aside. The witnesses available in 1955 may no longer be available; and even if they are available they could hardly be expected to have any trustworthy memory of events in May 1954. Almost certainly, since there was no trial of the action, none of the witnesses gave testimony in such form that it could be used now in the event that they cannot be located.

In this respect the state is usually at a serious disadvantage where pleas of guilty are nullified and the case must be tried years later. Where there has been a trial and a retrial is required, the state may use the evidence of a witness who has become unavailable. New York Code of Criminal Procedure § 8(3)(c)(d). Where a defendant has pleaded guilty, however, it would be a very rare case where the witness would have testified under oath subject to cross examination under such circumstances that the evidence could be used if the witness were later unavailable.

"Of course, the petitioners will testify concerning their claims in the light of their present state of mind with their imaginations prodded and guided by recent court decisions, including the majority opinion here, which point out the facts which will support a petition.

Settling cases on pleas of guilty is the means whereby the state and the defendants concerned dispose of about 80% of all charges of serious crime and about 95% of all convictions of such crimes. Of course in all such cases defendants are represented by counsel and, almost without exception, this had been the practice in the State of New York for many years prior to *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). It is a system which is advantageous to all the parties concerned; it saves an enormous amount of time for law enforcement officers and prosecutors; almost always it virtually guarantees the defendant a lesser penalty, usually on lesser and fewer charges, it frequently makes possible the prosecution or disposition of charges against other persons; it enables the judges and courts to handle many times the volume of cases which could be processed were trial required in every case.

If a defendant's decision to plead guilty can be attacked and placed in jeopardy many years later, the state will have been deprived of a substantial part of the benefit which it properly and fairly thought it should enjoy—namely, achieving a sure and certain result and saving considerable time and expense. Once the court has accepted the plea, and imposed sentence there is nothing which the state can do to reopen it. The charges which have been dismissed and disposed of are finally settled

"The rationale for this has been articulated in the American Bar Association Standards for Pleas of Guilty, formulated by an Advisory Committee, of which Walter V. Schaefer, Justice of the Supreme Court of Illinois, was Chairman and adopted by the ABA House of Delegates in February 1968.

forever. Absent any fraud or overreaching existing at the time of the plea, the same rule should apply with respect to the defendant's right to reopen the case. The people cannot benefit from any subsequent change in the law and the defendant should have no right to reopen the proceedings years later because some different procedure has been created by judicial decision.

The interest in finality is particularly important in this area because of the great percentage of convictions based upon pleas of guilty. As shown by the chart below, about 95% of all New York State indictments resulting in conviction are disposed of by pleas of guilty; in other words, for every conviction obtained after trial, 19 convictions are obtained by guilty pleas.

DISPOSITION OF INDICTMENTS IN NEW YORK STATE (excluding youthful offender cases)[3]

Year ending June 30,	*Total dispositions*[4]	*Disposition by dismissal, discharge on own recognizance, and acquittal*	*Total convictions (after trial and by guilty plea)*[5]	*Convictions by guilty plea*	*% of total dispositions based on guilty plea*	*% of total convictions based on guilty plea*
1963	18,711	3,288	15,423	14,655	95.0%	78.3%
1964	17,619	2,445	15,174	14,413	94.9%	81.8%
1965	16,421	2,188	14,233	13,501	94.8%	82.2%
1966	17,447	2,204	15,243	14,482	95.0%	83.0%
1967	18,029	2,701	15,328	14,461	94.3%	80.2%
Total 1963-1967	88,227	12,826	75,401	71,512	94.8%	81.0%

[3] From the annual reports of the Administrative Board of the Judicial Conference of the State of New York, for the years 1964

(*footnote continued on following page*)

Circuit Court Opinions—Ross and Dash—Dissent (Lumbard, Ch. J.).

Were there any reason to suppose that injustice has resulted from the taking of pleas of guilty in New York courts in cases where prisoners, represented by counsel, had confessed, further inquiry would at least be justified. But no such suggestion has been made; no cases of injustice are cited and so far as I am advised there have been no such cases. For many years New York State has provided counsel in all cases where serious crime is charged and the defendant is unable to retain counsel. Absent some credible and detailed proof to the contrary, we must assume that defendants have been properly advised by their counsel, that their interests have been protected, and that pleas of guilty would not have been offered without substantial basis for believing that the defendants were guilty in facts and guilty in law.[5]

For these reasons I find no justification in questioning these pleas of guilty in the light of the claims the petition-

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(*footnote continued from previous page*)

(pp. 236-239), 1965 (pp. 193-195), 1966 (pp. 269-271), 1967 (pp. 243-246), 1968 (pp. 333-335).

[4] The figures were arrived at by adding the figures from the Criminal Terms of the Supreme Court of New York City and the Supreme and County Courts outside New York City. The figures include all indictments disposed of:

(1) by plea of guilty to felony before, during or after trial,
(2) by plea of guilty to misdemeanor reduced from felony before, during, or after trial,
(3) by dismissal of the indictment,
(4) by discharge on own recognizance,
(5) by direction of acquittal,
(6) by acquittal after trial,
(7) by conviction after trial.

[5] Of course the gross incompetence of counsel *or* other circumstances indicating substantial failure of representation would present a different question under the Sixth Amendment. No claim of that sort is even suggested in these cases.

ers have made here. Nor do I find anything in any decision of the Supreme Court which requires a Federal court to hold a hearing on such claims. In *Machibroda* v. *United States*, 368 U. S. 487 (1962), the claim was that the court had not made proper inquiry regarding the voluntary nature of the plea as required by Rule 11, Federal Rules of Criminal Procedure, and also that the plea was entered because of promises and threats of the prosecutor. The court there held that despite affidavit denials by the prosecutor, the issues of fact required a hearing. No such compelling allegations are made by Ross or Dash.

Nor does *Jackson* v. *Denno*, 378 U. S. 386 (1964), require the district court to consider the confession claims. *Jackson* held that a defendant who had gone to trial, before a jury which was left to determine whether the confession admitted in evidence was voluntary, had been denied due process of law, since it was impossible to determine how the jury treated the confession. Here, however, the unconstitutionality of the pre-*Jackson* procedure is relevant only for its supposed impact in deterring defendants from going to trial and thereby inducing their pleas of guilty. This impact, which would be virtually impossible to determine, since it requires reconstructing the defendant's state of mind, is unquestionably remote and speculative. It cannot be doubted that the existence of the pre-*Jackson* procedure has had a far more remote effect on the reliability of the process for determining guilt, cf. *Johnson* v. *New Jersey*, 384 U. S. 719, 729 (1966), in plea of guilty situations than it has had in cases which actually went to trial.

Nor is it accurate to say that going to trial and contesting the voluntariness of their confessions was a useless procedure for defendants who claimed that their confessions had been coerced. Since 1955 this court has carefully examined records in New York State criminal trials where

such claims were made, and in some cases we have found that the confessions were coerced, despite jury findings to the contrary which had been accepted by the New York courts. See, e.g., *U. S. ex rel. Caminito* v. *Murphy*, 222 F. 2d 698 (1955), cert. den. 350 U. S. 896; *U. S. ex rel. Wade* v. *Jackson*, 256 F. 2d 7 (1958), cert. den., 357 U. S. 908; *U. S. ex rel. Corbo* v. *LaVallee*, 270 F. 2d 513 (1959), cert. den., 361 U. S. 950 (1960).

For these reasons, and because of the far greater effect it would have upon the administration of justice if it were applied to plea of guilty case, I think it is clear that *Jackson* v. *Denno* should be applied retroactively only to cases which went to trial. Cf. *Stovall* v. *Denno*, 388 U. S. 293 (1967).

There is no authority to the contrary. In the only case where this court has required a hearing involving a plea of guilty in a state court, *U. S. ex rel. McGrath* v. *LaVallee*, 319 F. 2d 308 (1963), the claim was that the trial judge had coerced the plea; there was no claim of a coerced confession.[6]

While I would affirm the denial of the prisoners' petitions for the reasons stated above, I also believe that even on principles stated in Judge Smith's opinion, it is clear that there is an insufficient basis to require a hearing. Therefore I proceed to discuss the facts of the two cases.

Petition for Wilbert Ross

On February 4, 1955, when Ross pleaded guilty to murder in the second degree, he knew that one Robert

[6] Following this 1963 opinion there was an extensive hearing in the district court at which the state judge testified. The district court judge held that there had been no coercion by the state court judge and we affirmed he district court's denial of the petition for habeas corpus. 348 F. 2d 373.

Jenkins (whom he does not deny knowing) had told the police that Ross had forced him to commit the murder by threatening Jenkins' life and the life of Jenkins' wife. Ross knew this because, by means of an inter-office device, he heard Jenkins tell this to the police. At this time Ross was in jail on a charge of attempted grand larceny. Ross claims that following threats of the detectives, and after his request to consult his lawyer had been refused, he gave a statement which he signed after it had been reduced to writing. He was later questioned by an Assistant District Attorney and he signed a statement which consisted of questions and answers which had been stenographically recorded. He was not advised about an attorney and he did not ask to consult an attorney.

Ross advised the police where they could find the murder weapon and they did find it. Ross does not claim to be innocent of the murder; it is abundantly clear that he is not.

Had Ross stood trial and had he testified he would have had to admit to a criminal record—by his own petition he had by then been convicted of attempted grand larceny (whether after trial or on plea he does not state) for which he had meanwhile been sentenced to a term of two to three years in state prison.

Ross was represented by Harvey Strelzin, Esq., whose competence he does not question, and Strelzin, who knew of Jenkins and the gun, advised a plea of guilty to murder in the second degree. Ross does not offer Strelzin's affidavit in support of his position, nor does he account for his failure to submit any affidavit or statement from Strelzin.

The majority holds that a petitioner must show that the plea was "substantially motivated by the coerced confession" before he is entitled to relief. As illustrated by *Rosen*, which we also decide today, a petitioner is also

required to make a substantial showing that the plea was in fact the result of the coerced confession and not of some other factor before he is entitled to a hearing. Whether the petitioner had made a sufficient showing in any particular case can only be determined by looking at the specific allegations. Where, as here, it appears that there was substantial other evidence against the petitioner, that his counsel recommended that he not pursue the confession claim, that he pleaded to a reduced charge, and that he did not raise the claim for ten years, the petitioner should be required to make more of a showing than the bare boned allegations he has made here before any court should be required to grant a hearing. In my view, petitioner's unsupported allegations suggest a conclusion that his counsel told him not to bother trying to "get back" his confession and going to trial, since he would, even without the confesison (or the gun, for that matter), stand a good chance of being convicted of first degree murder and being sentenced to death. Ross accepted this as good advice and accepted the plea as a good bargain. Far from showing that the plea was substantially motivated by the confession, the allegation shows that it was motivated both by the knowledge of guilt and the fear of being convicted for the crime he actualy committed. In these circumstances, the plea should stand and no hearing to question it should be required.

Petition for Foster Dash

The petition of Foster Dash seeks a hearing on two different grounds: (1) that the plea was involuntary because there was not available to him at the time of his plea in 1959 a constitutional means of testing the voluntariness of his confession; and (2) that the trial judge coerced him into pleading guilty by threatening him that

he would get the maximum sentence if he stood trial and was convicted. As to the first ground, I would deny relief for the reasons I have set forth above.

But, even applying the standards set forth in Judge Smith's opinion, I do not believe a hearing should be granted as Dash gives no reason why he has not supported his petition with an affidavit or statement of his counsel. In fact there is nothing in the record to show who counsel was. The petition is wholly insufficient in failing to supply many material details of which the petitioner must have knowledge.

From Dash's sketchy petition, the answering affidavit of an Assistant Attorney General which is not controverted by Dash as to any stated facts, and from the decisions of the New York courts concerning Dash and his three co-defendants the following emerges:

On February 9, 1959, four persons, one of whom was armed, held up and robbed one Shedletsky in Bronx County. On February 24, 1959, the Grand Jury indicted Joseph E. Fields, "John Doe," "Richard Roe" and "Peter Doe" for the crime. Fields was the only one who had been apprehended soon after the crime and it was he who shortly thereafter named as his three confederates the petitioner, Foster Dash, Albert Devine and Rudolph Waterman.[2]

Dash was arrested on Febuary 25 or 26. His petition alleges the police took him to a station house in New York County where he was beaten but said nothing and thereafter to a station house in the Bronx. He requested to contact his family, or that he be permitted to have counsel, but he alleges these were denied him. He was further questioned and held incommunicado for 7½ hours

[2] Apparently Waterman was not questioned until June, 1959, when he was in prison on another charge. The record does not show when Devine was arrested.

and then taken to the district attorney's office. He alleges threats made to him and the denial of his further requests. He says that he "then involuntarily signed a prefabricated confession to a crime that I did not commit."

Dash first mentions his "defense counsel" as being present on March 16, 1959 when he appeared for pleading and the district attorney "was only offering a plea to robbery in the first degree." He claims counsel advised him to plead guilty and throw himself on the mercy of the court because of the confession.

When the case came up again for pleading on April 1, 1959, Dash alleges the trial judge stated that if he went to trial and lost, the court would impose the maximum penalty and the judge said the crime with which he was charged was "next to murder."

Dash alleges that when the case was called again on April 6, he entered a plea of robbery in the second degree "due to the undue pressure which was placed upon this relator, as well as the alleged co-defendant." Later in his petition Dash states that "the threats made by the court was not a matter of open record." Fields also pleaded guilty that day. Later, on August 3, 1959, Dash was sentenced to a term of 8 to 12 years as a multiple offender. From Dash's petition it seems that prior to the plea he was already a second felony offender and if he pleaded guilty he faced a possible maximum sentence of 60 years. Fields was sentenced to 10 to 12 years.

Waterman and Devine stood trial and following their conviction for robbery first degree, grand larceny second degree and assault second degree, they received sentences of 15 to 20 years. The Appellate Division in *Peop. v. Waterman,* 12 A. D. 2d 84, reversed the convictions and the Court of Appeals affirmed on the ground that it was constitutional error to admit into evidence the post-indictment statement of Waterman taken in the absence of counsel, 9 N. Y. 2d 561 (1961). Waterman and Devine

later pleaded guilty to assault second degree and were sentenced to 2½ to 3 years.

Dash then brought *coram nobis* proceedings, seeking treatment similar to Waterman and Devine on the ground that his confession had induced his plea of guilty, and he also claimed his plea was coerced by the judge's threat. His petition was denied by all courts although in the Court of Appeals two judges voted to remand for a hearing as to whether the guilty plea was coerced. In its memorandum decision, 16 N. Y. 2d 493 (1965), the Court of Appeals, because *Jackson* v. *Denno*, *supra*, had but recently been decided, expressly approved its earlier holding in *People* v. *Nicholson*, 11 N. Y. 2d 1067 (1962), that it would not listen to post-conviction attacks on confessions where defendants had pleaded guilty. The court wrote:

> "A defendant who has knowingly and voluntarily pleaded guilty may not thereafter attack the judgment of conviction entered thereon by *coram nobis* or other post-conviction remedy on the ground that he had been coerced into making a confession and that the existence of such coerced confession induced him to enter the plea of guilty. If a defendant desires to contest the voluntariness of his confession, he must do so by pleading not guilty and then raising the point upon the trial; he may not plead guilty and then, years later, at a time when the prosecution is perhaps unable to prove its case, assert his alleged constitutional violation. The issue as to whether the confession was illegally obtained is waived by the guilty plea."

Thereafter Dash knocked on the federal court doors of the Southern District.

In my view, Dash, advised by counsel, made a deliberate and voluntary choice that his interests were best served by

his plea of guilty. He must have known that Fields had made a statement to the police which implicated him; he did not know what Waterman and Devine might do.

But the petitioner says nothing about what counsel advised him, what he and counsel knew and what evidence was available to the state. We are not even told the name of counsel and whether counsel was retained or assigned. We do not know whether the victim of the robbery, Shedletsky, could identify Dash; obviously he had identified Fields who was caught soon after the crime.

As to the second ground for a hearing, the alleged threats of the judge, the New York Court of Appeals has passed upon this and has held in effect that not enough is alleged to require a hearing. I agree. The allegation seems to amount to little more than that the judge pointed out to the defendant, as indeed he should have, what he faced in the event of conviction, whether by trial or plea. Obviously the record does not bear the petitioner out as he alleges that "the threats made by the court was not a matter of open record." If we had before us an affidavt of counsel or any other reliable witness to support Dash's claim of judicial coercion there might be sufficient reason to order a hearing as we did in *U. S. ex rel. McGrath* v. *LaVallee,* 319 F. 2d 308 (1963) where the court thought the minutes were ambiguous. But here there is insufficient substantiation and the district court properly denied a hearing.

For these reasons I would affirm the judgments of the district courts which denied the petitions of Ross and Dash for writs of habeas corpus.

The enforcement of their criminal laws by the states is an area where federal courts should act with some care and with due appreciation of the consequences. When the Supreme Court decided *Fay* v. *Noia,* 372 U. S. 391 (1963), where it held that federal habeas corpus is still available

to a state prisoner even though he has failed to appeal his conviction. Mr. Justice Clark in his dissent pointed out that the floodgates were being opened. The following year state prisoners filed 3,531 petitions in federal courts, an 88% increase over the 1,903 petitions the year before. The tide rose year by year:

Fiscal Year	State Prisoners Habeas Corpus petitions filed in the District Courts
1963	1,903
1964	3,531
1965	4,664
1966	5,162
1967	6,048
1968	6,331

As a majority of my colleagues have now clearly charted for all state prisoners who are imprisoned after pleas of guilty what they must allege in order to get a hearing, it will follow as surely as night follows day that the federal courts will be inundated with petitions which will total many times the 6,331 commenced in 1968.

Everywhere in the United States local courts and prosecutors are today having to cope with a steadily mounting increase in criminal cases each one of which requires two or three times more court time than was the case a few

The District of Columbia, the Canal Zone, Guam and the Virgin Islands are excluded. See the Annual Report of the Director of the Administrative Office of the United States Courts at 11-41 (preliminary ed. 1968).

Of the total of 6,331 such petitions filed during the period from [illegible] 1,382 or 13% were filed in the District Courts of the Second Circuit. See the annual report of the Director of the Administrative Office of the United States Courts for the years 1963 (p. 201), 1964 (p. 221), 1965 (p. 181), 1966 (p. 175), 1967 (p. 205), 1968 (table C-3 preliminary edition).

years ago. Counsel is usually assigned at the beginning of the case, at least as early as the arraignment. Thereafter preliminary hearings are held on search and seizure, the admissibility of confessions, identification and other evidence. Only after such hearings have been decided adversely to the defendant are cases tried or pleas of guilty entered. Thereafter appeals are taken and in New York there may be taken even after plea of guilty. But this will not be the end because the federal courts, if the views of my colleagues in these cases should prevail, must now entertain petitions from state prisoners who pleaded guilty years ago and hold thousands of hearings.

With these decisions we accelerate unmistakably the trend toward federal court supervision and correction of every possible error or supposed error which can be found in the prosecution of a state criminal case. What plea of guilty cannot be alleged to have been entered for some unlawful reason? What is there left which cannot be asserted to be a violation of due process or an unequal protection of the laws? Here is the most competent and experienced attorney who is employed to represent a defendant to protect him against any charges of incompetence or failure to give a defendant requisite advice as to the charges or a settlement by way of guilty plea.

I seek to be counted among those who do not think federal judges were ever meant to review state criminal proceedings as they do now. There is no basis for supposing that there was such a mass of evil which flowed from state court judges. We would be well advised not to exaggerate our ultimate power to ourselves, as has been done by federal decisions the past six years in the name of safeguarding constitutional rights, and to be wary of extending such power, except in the most compelling circumstances. We have gone far enough already; we should not take the further step which will lead to the serious impairment, or, in effect, of every plea entered in a state court.

I would affirm the district court orders which denied the petitions.

Moore, *Circuit Judge* (dissenting) (with whom Chief Judge Lumbard and Judge Friendly concur):

I would not differ from Judge South's thoughtful and carefully analytical opinions in this and the companion case: *United States ex rel. Dash*, including the comment "when to hold a hearing has apparently been complicated in this Circuit," were it not for the fact that these decisions well illustrate the "complicated" nature of the problem, namely, hearings directed in *Ross* and *Dash* and no hearing in *Rosen*.

My doubts and disagreement stem from the majority's assumption that "This case raises the narrow question whether a District Court should apply the standards of *Townsend v. Sain*, 372 U. S. 293 (1963), in determining whether to hold an evidentiary hearing upon a habeas corpus petition where the petitioner is confined after a plea of guilty and is contending that the plea was not voluntary, because it was induced by the existence, or threatened use, of an allegedly coerced confession."

The belief of four members of the Court in *Townsend v. Sain*, *supra*, as to the ineffectiveness of the so-called "standards" in actual application is well expressed in the dissenting opinion of Mr. Justice Stewart at 372-374. Furthermore, I find nothing in *Townsend v. Sain* which indicates that "where the petitioner in such a case has not received a 'full and fair evidentiary hearing' in a state court as to the voluntariness of the plea, a hearing be held in the federal District Court."

Townsend was convicted of murder after trial by jury; the habeas corpus proceeding was based upon the illegal admission of a confession obtained while he was under the influence of drugs. The Supreme Court was not dealing

with a plea of guilty, the circumstances under which it was made or, as here, the quality of the evidence in the petition attacking the plea. Therefore, the so-called "standards" of the majority in *Townsend v. Sain* relating to the development of the factual circumstances surrounding an illegal confession cannot be expected to be the standards which that Court would have set were it dealing with a situation in which petitioner sought to repudiate a guilty plea.

Referring to the specific cases now under consideration: In *Ross*, the trial court had all the essential facts before it to render an objective decision, yet this court directs a hearing. In *Rosen*, in addition to allegations of the existence and threatened use of a coerced confession, there was proof that Rosen's wallet (comparable to the gun evidence in *Ross*) was found at the scene of the burglary and that he "was represented at trial by [experienced] counsel whose competence he does not attack." Accordingly, this court finds that "the application was insufficient" to justify a hearing. In *Dash*, there was also the existence and threatened use of an allegedly coerced confession and a State court rejected claim of a threat by the trial judge to impose a maximum sentence if Dash were found to be guilty. This court holds that "In these circumstances there is an issue as to the motivation of the plea which cannot be resolved without a hearing."

If "motivation" is to be the test, of necessity there must be a hearing in all cases so that the prisoners' mental processes may be reviewed and appraised in the light of their present reflections over their now ninety-day-old decisions to plead guilty. If our decision to consider at bar these three cases has been for the purpose of affording some "standards" for district court judges in their determinations as to when to hold a hearing, our deliberations and the results thereof have been an exercise in futility. The conclusion is obvious that appellate judges have chosen to read the petitions differently in the three cases

and that the strongest factual case for denial of a hearing. *Ross*, heads the group in reversal of the district court's appraisal of the merits of the application.

The answer is not to be found in generalities in the many cases in which hearings had actually been held in the district court. In this group are: *United States ex rel. Swanson v. Heyne*, 344 F. 2d 260 (2d Cir. 1965), *cert. denied* 382 U. S. 862; *Hall v. United States*, 259 F. 2d 430 (8th Cir. 1958), *cert. denied* 359 U. S. 947; *Watts v. United States*, 278 F. 2d 247 (D. C. Cir. 1960); *United States ex rel. Staples v. Pate*, 332 F. 2d 531 (7th Cir. 1964); *United States ex rel. Boucher v. Reincke*, 341 F. 2d 977 (2d Cir. 1965); and *United States ex rel. Sichold v. Reincke*, 362 F. 2d 502 (2d Cir. 1966).

None of these cases bear upon the issue "when to hold a hearing." This question must, and can, be determined only from the papers before the district judge. This urgent, often overlooked or ignored, was succinctly stated in *United States v. Allen-Bey* (Anderson, C. J., Lumbard, C. J. and Waterman, C. J. concurring), 365 F. 2d 992 (1966), as follows:

> "The trial court's exercise of discretion can only be tested in the light of the reasons disclosed at the time the motion was heard and not on the basis of more elaborate representations argued on appeal. *Unan v. Stroble*, *supra*, at 580, 81 S. Ct. 341."

Accepting the premise that the district judge has before him only the petition and possible supporting affidavits and the statement in *Allen* that "a voluntary guilty plea entered upon advice of counsel is a waiver . . ." in my opinion inquiry should focus upon "voluntary" and "advice of counsel." In other words, has the petitioner met his burden of showing, in a factual and not a conclusory manner, that pressures, deceit or possibly mistakes of

material facts of constitutional magnitude were the inducing cause of his guilty plea—the elements crucial to a decision by the district judge as to whether to hold a hearing? To decide this question, the district judge must attempt to make an objective evaluation of an essentially subjective decision by the prisoner, to wit, what induced him to plead guilty? Sufficient factual allegations should be presented so that as accurate a reconstruction of the "guilty plea" scene may be made as possible. First, consider the confession. It was definitely made when Ross was "in custody." The custody, however, was not while under suspicion of the murder but rather in Sing Sing Prison where he was serving a sentence for attempted grand larceny. Second, at the time of his plea, Ross was represented by competent counsel. Third, Ross knew that a co-defendant, Jenkins, had confessed and would testify against him. Fourth, Ross knew where the gun, the murder weapon was. Fifth, Ross' attorney knew of Ross' claim and professed desire to repudiate the confession. Against the background of these facts, Ross pleaded guilty. There is no showing that Ross did not understand their effect on a possible conviction of first degree murder or that he did not have a full opportunity to discuss all the facts with his attorney and weigh their consequences. Ross has produced no facts indicating incompetence of counsel or inadequacy of access to him.

Upon all the facts, I conclude that the district judge properly exercised his discretion in denying the petition without directing a hearing. Ross, in my opinion, has failed to meet his burden of showing that his plea was involuntary. In a way, every plea is "involuntary" because the defendant is forced, even coerced, by the situation then facing him to make a decision and to choose between the two evils which then confront him. If he chooses the lesser of the two evils, he is scarcely making a "voluntary" (in a Websterian sense) decision. Probably at least

should be an "understanding" decision to be determined as objectively as possible—therefore, the importance of the factual allegations. To be sure, Ross' choice obviously was not easy or pleasant. He alone had to make that choice in the light of his own secret knowledge of his guilt or innocence, the not so secret knowledge of the gun and Jenkins' proof, and aided by the practical and objective advice of counsel.

I do not differ with the majority's statement that "The question to be answered in any case involving a collateral attack on a conviction based on a plea of guilty is usually expressed in terms of whether or not the plea was a 'voluntary' act."—but this is not the question now before us. Nor are we faced with the hypothesis suggested by them, that we would be holding that a coerced confession may never be raised as a factor rendering a plea involuntary. I would not so hold and do not find that our own cases reach this result.

Affirmatively, I would hold that an appellate court should not follow the line of least resistance; namely, to grant a hearing in every case and, thus, by their decisions deter district judges from deciding cases without a hearing where no substantial showing has been made by petitioners that their pleas of guilty were involuntary. This leads me to the conclusion that we should adhere to our supposed appellate function and pass upon the district judge's judgment and not consider the case *de novo*. Using this standard, I find that upon the facts before him in this case, he properly denied the petition without a hearing.

I am not unmindful of the decision in *United States ex rel. Richardson* v. *McMann* (also decided this day). That case presents an unusual exception to the principle that a district judge can pass only upon the papers before him. There we took into consideration the allegations placed before us in an affidavit presented for the first time in the

appellate brief which raised, in effect, the question of inadequate representation of counsel. Whether these charges are frivolous and possibly perjurious or are based upon fact could not have been determined on the papers before us. Under these special and exceptional circumstances, we felt that the interests of justice required a hearing at which all parties, vitally interested in establishing the true situation could be heard.

The *Richardson* case is not in my opinion in any way controlling on the problem here, and I would affirm the district judge's decision.

FRIENDLY, *Circuit Judge* (dissenting) (with whom Chief Judge Lumbard and Judge Moore concur):

No decision of the Supreme Court has held or even intimated that an accused who has been convicted upon a guilty plea, made on the advice of counsel after full explanation of its consequences and without coercion or trickery of any sort by the state, and thus "voluntary" in the ordinary use of language, is entitled to have the conviction set aside because the plea was influenced in greater or less degree by a previous act of the state in violation of his constitutional rights.

The two decisions relied on in the majority opinion are *Machibroda v. United States*, 368 U. S. 487 (1962), and *Harrison v. United States*, 392 U. S. 219, 223 (1968). *Machibroda* was the archetype of a claim of an involuntary plea in the time-honored sense; the defendant alleged this had been made on the faith of a promise by an Assistant United States Attorney that was not performed. While the Court's statement, quoting *Kercheval v. United States*, 274 U. S. 220, 223, that guilty pleas should not be accepted "unless made voluntarily after proper advice and with full

understanding of the consequences" is indeed clear, as a concurring opinion here states, what is equally clear is that the Court was not speaking at all to the issue whether a plea so made can nevertheless be set aside, long after the defendant has gotten the benefit of his bargain and when the state has lost its ability to prosecute, because of previous allegedly impermissible conduct by the state. The quotation followed the hardly novel affirmation that "A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void." The sole issue in the case was whether Machibroda had alleged enough to have a hearing. The Justices who decided he had could scarcely have believed they were settling the altogether different and highly important issue we have before us here. The decision by a sharply divided Court in *Harrison* dealt with still another problem, of rather small practical dimensions, the use of testimony at a previous trial that was claimed to have been induced by a previous illegally obtained confession.

The effort of the concurring opinion to fill the void with an extract from *Herman* v. *Claudy*, 350 U. S. 116, 118 (1956), is a dismal failure. It is true that Mr. Justice Black there stated, to give the quotation in full, "Our prior decisions have established that: (1) a conviction following trial or on a plea of guilty based on a confession extorted by violence or mental coercion is invalid under the Federal Due Process Clause." However, none of the six decisions cited in support of that statement related to guilty pleas. The *Herman* case did concern such a plea but the opinion must be read in the context of petitioner's allegations, 350 U. S. at 119, that:

> "The assistant prosecuting attorney demanded that petitioner sign a plea of guilty to all the charges. When petitioner asked what he was signing, the assistant prosecuting attorney said 'Sign your name and forget

it.' Petitioner was not informed of the seriousness of the charges by the prosecutor or the judge; he did not know that his plea of guilty could result in a maximum sentence of some 315 years; he did not know nor was he informed that he could have counsel. Petitioner pleaded guilty to all of the charges against him. He says now he was innocent of all but one."

No cumulation of resounding adjectives can conceal the chasm separating *Herman* v. *Claudy* from the case before us. If any such facts had been presented here, there would have been no *in banc* and no dissents. To regard a phrase in the *Herman* opinion as compelling decision without regard to the totally different facts that gave rise to it is to ignore rather than to follow the genius of the common law system.[1]

Our own previous opinions point away from the determination now made rather than toward it. While the court sitting *in banc* is free to engage in a new departure, I perceive no sufficient reason for embarking on an uncharted course that will impose a tremendous burden on state and federal judges, prosecutors and lawyers furnishing assistance to the indigent and, to the small extent it has any practical effect, will further impair the ability of society to protect itself "against those who have made it impossible to live today in safety." *Harrison* v. *United States*, *supra*, 392 U. S. at 235 (dissenting opinion of White, *J.*, see also dissenting opinions of Black, *J.* and Harlan, *J.*).

The court's opinion supplies no intelligible guidelines to help lower courts in handling the Herculean task it assigns

[1] The same comment applies to the reference to a characterization of *Herman* in *United States ex rel. Vaughn* v. *LaVallee*, 318 F. 2d 409 (2 Cir. 1963), where this court approved denial of habeas corpus to a petitioner who alleged that his guilty plea was induced by an illegal search.

them. A hearing must be had whenever a prisoner makes "particularized allegations as to how that confession rendered his plea involuntary." This test will speedily become well known in the prisons and is exceedingly easy to meet; the error made by the relator in *United States ex rel. Rosen v. Follette*, decided herewith, will not be repeated. The court gives almost no aid concerning the standard for ruling on petitions after a hearing has been held. Is it enough that the illegal confession was *a* factor or must it have been an *important* factor? And how can anyone tell? Isn't a confession almost inevitably an important factor except when the other evidence is overwhelming? Even if the standard were framed a bit more rigidly so as to require a showing that the plea would not have been made "but for" the confession, the trial courts are being given a job impossible of successful performance. Despite superficial similarity, this issue is actually quite different from determining whether a plea of guilty was "voluntary" in the traditional sense. To decide that issue the court need only determine whether unfair pressures were applied; if they were, *non constat* that the defendant would have pleaded guilty without them. For the same reason the question is also less susceptible of satisfactory answer than deciding whether a confession was "voluntary"; yet lack of confidence in the ability of judges to handle that issue underlay the prescription of specific rules on police interrogation in *Miranda v. Arizona*, 384 U. S. 436 (1966). Even in what would seem the strongest case for the prisoner, namely, where a confession illegally obtained when other evidence was then lacking has been speedily followed by a guilty plea, how can anyone ever know whether the accused would not have made the same decision anyway, because of his knowledge of the availability of additional evidence and the consequent attractiveness of a lower sentence? The only cases concerning which there can be reasonable cer-

tainty are those at the opposite end of the spectrum, where there was so much untainted evidence that the confession could not have been a significantly motivating factor. If the "but-for" test is the right one, the instances where a court will be required to set aside a guilty plea will thus be a small fraction of the fraction in which a confession was illegally obtained; in an even smaller fraction of these would the defendant have escaped conviction; and the fraction in which he was innocent will, of course, be infinitesimal. If ever a situation called for heeding Mr. Justice Jackson's admonition against seeking needles in haystacks, *Brown* v. *Allen*, 344 U. S. 443, 536-39 (1953) (concurring opinion), and enabling courts and lawyers to devote their limited time to worthier causes, this is it.

On the other hand, any standard less severe than the "but-for" test would be grossly unfair to the state, and even this is unfair enough. In contrast to the situation where the legality of a confession has been tested before or in the course of a trial, the prosecutor will generally have dismantled whatever material he had. If the constitutional claim succeeds, the state will rarely be able to conduct the trial that is all the defendant deserves on any view, even though sufficient untainted evidence was available when he pleaded guilty years before. Here, if Ross had elected to stand trial for murder fourteen years ago, Jenkins would have been an important witness against him; we are not told whether Jenkins is still available but, even if he is, his evidence concerning events of 1954 will not be very convincing. The way to protect both the accused and society with respect to this problem, is through statutes like §§ 813-c and 813-g of the New York Code of Criminal Procedure which allow the defendant to move in advance of plea to suppress the fruits of an unconstitutional search or an illegally obtained confession and, if the motion is denied, to plead guilty and nevertheless appeal; a record

is thus made and, if the accused prevails, he can be tried before too much time has elapsed since the crime. With these statutes taking care of the future, I would leave the past where these prisoners were content to have it.

I recognize that the court apparently limits itself for the time being, to New York confessions antedating *Jackson* v. *Denno*, 378 U. S. 368 (1964), and postpones the problems with respect to later New York confessions, those in Connecticut and Vermont, and illegal searches and seizures. I realize also that a special argument can be formulated concerning these pre-*Jackson* confessions on the basis that the accused had no constitutionally acceptable way to test their legality. But the pejorative overtones of such a statement considerably outrun the fact. While the procedure prescribed by *Jackson* is a substantial improvement, the previous New York practice was a long way from denying an accused a reasonable opportunity to have the validity of his confession determined. The majority in *Jackson* conceded that New York's belief in the fairness of its procedure was "not without support in the decisions of this Court," 378 U. S. at 395, notably *Stein* v. *New York*, 346 U. S. 156 (1953), and four Justices found nothing constitutionally wrong with it. Furthermore there was always the opportunity to resort to federal habeas corpus in the event of conviction and to have the voluntary nature of the confession tested there. The case where a defendant otherwise willing to stand trial was forced into a guilty plea by the difference between pre-*Jackson* and post-*Jackson* procedures with respect to confessions, is thus a construct of the fertile brains of defense lawyers without counterpart in reality.

The rhetoric in the concurring opinion is badly misplaced. The issue is not whether Ross and others like him should be denied rights accorded them under the due process clause, which all would agree they should not, but whether,

after having made a bargain recommended by competent counsel with full knowledge of the facts and the consequences, they should now be permitted to repudiate it on grounds whose availability was then well known to them, at a time when the state is unable effectively to controvert either their claims of illegality or prove their guilt. Any morality in this position altogether eludes me. It is high time to recall that, even with respect to criminal defendants, a bargain is a bargain if made by an intelligent man with full protection from the court and on the advice of counsel. The thousands of tedious journeys which we here inflict on state and federal judges cannot be justified by any real prospect that a few innocent defendants may be found at the end of the tunnel. Men who first confess and then, on the advice of counsel, plead guilty to serious crimes, do so because they are.

For these reasons, as well as those given by my brothers Lumbard and Moore, in whose opinions I join, I decline to participate in opening up a large new area where New York criminal convictions have been thought until this time to possess finality.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 371—September Term, 1967.

(Argued April 1, 1968 Decided February 26, 1969.)

Before:

MOORE, WOODBURY* and SMITH,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Stephen W. Brennan, *Judge*, denying appellant's petition for a writ of *habeas corpus*, application for reargument, and application for a certificate of probable cause.

Reversed and remanded for a hearing.

JOHN T. BAKER, New York, N. Y., *for appellant.*

LILLIAN Z. COHEN, Assistant Attorney General, New York, N. Y. (Louis J. Lefkowitz, Attorney General of the State of New York, New York, N. Y.; Samuel A. Hirshowitz, First Assistant Attorney General, New York, N. Y., of counsel), *for appellee.*

* Of the First Circuit, sitting by designation.

MOORE, *Circuit Judge:*

This is an appeal from an order denying appellant's* petition for a writ of habeas corpus, for reargument and for a certificate of probable cause without an evidentiary hearing to determine the voluntariness of appellant's plea of guilty of second degree murder in the Supreme Court, New York County (28 U. S. C. § 2253).

On March 24, 1963, two of appellant's relatives were found murdered in their apartment and on the same day appellant was taken into custody. He told police that he had been in his relatives' apartment at the time an altercation between them began and claimed that he had attempted to break it up and, in so doing, got blood on his clothes. He was later booked for homicide and shortly thereafter, signed a confession. On April 20th, appellant was indicted in New York County, New York, for murder in the first degree and two attorneys were assigned to represent him. On that date he pleaded not guilty. On July 22nd, appellant withdrew his plea of not guilty to first degree murder and entered a plea of guilty to murder in the second degree under the first count of the indictment to cover both counts of the two-count indictment. He was convicted on that plea and was sentenced on October, 9, 1963, to a term of 30 years to life.

A subsequent motion to suppress the confession was treated as an application for a writ of error *coram nobis* and was denied without a hearing on July 27, 1964, by the Supreme Court, New York County. The Appellate Division affirmed without opinion. *People* v. *Ricardson,* 23 A. D. 2d 969 (1st Dep't 1965). Leave to appeal to the New York Court of Appeals was denied on June 8, 1965. State court remedies have been exhausted.

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* Appellant refers to relator, Willie Richardson.

Appellant presented a petition to the district court in which he alleged in substance that his plea of guilty to a reduced charge in the State court was invalid because it was induced by the existence or threatened use of an allegedly coerced confession.

Accompanying his brief to this Court, appellant has annexed an affidavit entitled "SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS" and claims that because he was without counsel when he filed his petition he "failed to include several facts" relevant to his petition and to his appeal. This affidavit was not before the district court which had no opportunity to consider it or the "facts" therein set forth. Despite the fact that this supplemental affidavit is not a part of the district court record, it is received so that the matters therein alleged may be thoroughly investigated and, if possible, the truth ascertained.

Appellant states in this affidavit that after indictment for first degree murder (1) Alfred Rosner, Esq., was assigned to represent him; (2) that Mr. Rosner came to see him the last week of June or the first week of July 1963; (3) that his entire visit "lasted approximately 10 minutes"; (4) that although Mr. Rosner asked what happened, he "did not take any notes"; (5) that "He [Mr. Rosner] told me [appellant] that he would get paid the same amount of money for representing me [appellant] regardless of the outcome"; (6) that "He [Mr. Rosner] did not mention what he intended to do to help me [appellant] or prepare my case"; (7) that the next time (July 22, 1963) he saw Mr. Rosner after the first visit in jail was when appellant was taken to the courtroom; (8) that three or four minutes before the proceeding began, Mr. Rosner told appellant that he should change his not guilty plea to a plea of guilty of second degree murder; (9) that appellant protested that he was not guilty, that the confession was taken

because of fear and physical beatings but that Mr. Rosner said that it was not the proper time to bring up the confession and that a guilty plea would save his life and "then I [appellant] could later explain by a writ of habeas corpus how my confession had been beaten out of me"; (10) that Mr. Rosner said that "the District Attorney, Mr. Hogan, was an extremely tough man and that he would be in court later"; (11) that Mr. Rosner told appellant that "the confession would in all probability get me [appellant] the electric chair and that he could attack the confession later without risking his life; that these were the motivating reasons for the change of plea, and that "I [appellant] did not plead guilty because I had committed the crime."

In contrast to this supplemental affidavit signed by Willie Richardson and notarized under a "County of New York" heading on January 15, 1968, by William E. Donahue, the record of the change of plea proceedings on July 22, 1963, before the Hon. George Postel of the New York Supreme Court, Special and Trial Term, Part 34 (appellant's appendix) shows that appellant was represented by two attorneys, Alfred I. Rosner, Esq., and William P. McCooe, Esq.; that the following colloquy took place between Court and the defendant [appellant here]:

> The Court: Now, did you discuss this case fully with Mr. McCooe and Mr. Rosner?
>
> The Defendant: Yes, sir, I did.
>
> The Court: Did you understand them when you spoke to them about your case?
>
> The Defendant: Yes, sir.
>
> The Court: Were you threatened in any manner, shape, or form, by anyone in order to induce you to take this plea?
>
> The Defendant: No, sir.

The Court: Are you taking this plea of your own free will and volition?

The Defendant: Yes, sir.

The Court: Have any promises been made to you by anyone, that is, your counsel, the District Attorney, the court officers, jail keepers, or anybody, concerning the sentence which this Court, meaning I, will impose in this case?

The Defendant: No, sir.

The Court: You are taking this plea of your own free will and volition?

The Defendant: Yes, sir.

The Court: Have any promises—without any promises of whatever kind or nature so far as sentence is concerned; is that right?

The Defendant: Yes, sir.

In *Townsend* v. *Sain,* 372 U. S. 293, 312-13 (1963), the Supreme Court stated the principle for determining when an evidentiary hearing must be held in a *habeas corpus* case:

> ". . . Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts."

This basic principle holds true unless a petitioner's allegations are "vague, conclusory, or palpably incredible," *Machibroda* v. *United States,* 368 U. S. 487, 495 (1962), or are "patently frivolous or false," *Commonwealth of Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116, 119 (1956).

Shortly after the decision in *Townsend* v. *Sain*, this court had occasion to consider the requirement of holding an evidentiary hearing in a *habeas corpus* case presenting, as here, an issue of the voluntariness of a guilty plea. In *United States ex rel. McGrath* v. *LaValle*, 319 F. 2d 308, 311-12 (2d Cir. 1963), this court stated:

> "When the petition in support of an application for *habeas corpus* reveals upon its face that it is defective as a matter of law, the habeas court may dismiss the application without a hearing. . . . Moreover, a hearing is not required when the habeas court has before it a full and uncontested record of state proceedings which furnishes all of the data necessary for a satisfactory determination of factual issues. . . . When, however, petitioner alleges that a guilty plea entered by him was the product of deceit, promise, or threat, and facts are specifically set forth which support that allegation and which create issues incapable of resolution by a simple examination of the files and records before the federal District Court, that court must grant the petitioner a hearing. Certainly, petitioner cannot be denied a hearing merely because the facts asserted by him are contradicted by the answer of the State's prosecuting officers, for it is this denial which creates the factual issue to be resolved." [Citations omitted.]

The court below considered only the transcripts of the minutes of the proceedings when the plea was entered and sentence imposed along with appellant's petition, and concluded that appellant's plea was voluntarily entered and, therefore, no hearing would be necessary.

A conviction which is based upon an involuntary plea of guilty is inconsistent with due process of law and is subject to collateral attack by federal *habeas corpus*. *McGrath*, *supra*, 319 F. 2d at 311; *United States ex rel. Siebold* v.

Reincke, 362 F. 2d 592, 593 (2d Cir. 1966). And the Supreme Court has stated that "a conviction following trial or on a plea of guilty based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause." *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116, 118 (1965).

In *United States ex rel. Vaughn* v. *LaVallee,* 318 F. 2d 499 (2d Cir. 1963), this court stated that "[a] plea of guilty which is prompted by fear that unconstitutionally obtained evidence will be used at trial will not sustain a conviction." This statement, however, was subsequently rejected in *United States ex rel. Glenn* v. *McMann,* 349 F. 2d 1018 (2d Cir. 1965), *cert. denied,* 383 U. S. 915 (1966). The petitioner in *Glenn* argued that his plea of guilty had been coerced by the existence of an alleged involuntary confession. The district court, however, denied the writ of habeas corpus without an evidentiary hearing after finding that the petitioner had failed to exhaust his state remedies. This court denied the petitioner's request for leave to proceed *in forma pauperis* and for assignment of counsel on a different ground, saying:

> "A voluntary guilty plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings against him. *United States ex rel. Swanson* v. *Reincke,* 344 F. 2d 260 (2d Cir. 1965); *United States ex rel. Boucher* v. *Reincke,* 341 F. 2d 977 (2d Cir. 1965). Any language to the contrary in *United States ex rel. Vaughn* v. *LaVallee,* 318 F. 2d 499 (2d Cir. 1963) is herewith disavowed." 349 F. 2d at 1019.

The issue of voluntariness had not been briefed, but the decision was apparently based upon a finding that the petitioner had not raised a genuine issue of fact in connection with the voluntariness of the plea.

In *United States ex rel. Martin* v. *Fay,* 352 F. 2d 418 (2d Cir. 165), *cert. denied,* 384 U. S. 957 (1966), this court reaffirmed the holding of *Glenn.* As Judge Waterman (whose concurrence was based on the exhaustion rule) pointed out, the word "voluntary" as used in the majority opinion was ambiguous, the majority opinion seemingly holding that either representation by counsel or a review of the colloquy between the prisoner and the judge was conclusive on the issue of the voluntariness of the guilty plea. Judge Waterman wrote: "I conclude that the majority may have in mind that unless a guilty plea is the product of force directly applied to the speaker at the time he pronounces the word 'Guilty,' no extenuating circumstances of any kind will justify a court in inquiring into events preceding this plea." 352 F. 2d at 419-20.

The weight of authority supports the holding of *Glenn* and *Martin, supra,* to the extent that a *voluntary* guilty plea waives all non-jurisdictional defects. See *United States ex rel. Rogers* v. *Warden,* 381 F. 2d 209, 213 (2d Cir. 1967) and cases cited therein. The explanation for this rule was given in *Kercheval* v. *United States,* 274 U. S. 220, 223 (1927), as being that "a plea of guilty differs in purpose and effect from a mere admission on an extra-judicial confession, it is itself a conviction. Like a verdict of a jury, it is conclusive. More is not required; the court has nothing to do but give judgment and sentence."

However, if a voluntary guilty plea is to be equated with a waiver of important constitutional rights, it is only logical that the standards for determining voluntariness must be as high as those for waiver. The presence of counsel and the conversation between judge and prisoner at the time the plea is taken are not necessarily conclusive on the question of whether the plea was voluntary. While these factors are relevant in determining whether the plea was voluntary, there may well be situations in which other

matters which are outside the record must be considered in making that determination.

In this case, the petitioner alleges that his guilty plea was the result of the threatened use of a coerced confession, that he did not want to plead guilty and wanted to assert his claim that the confession was coerced, but that his attorney inaccurately informed him that this was not the proper time to bring up the matter and that the claim should be presented at a later time. The decisions of a number of other circuits indicate that a petitioner would be entitled to an evidentiary hearing where somewhat similar allegations are made. See *Carpenter* v. *Wainwright*, 372 F. 2d 940 (5th Cir. 1967); *Doran* v. *Wilson*, 369 F. 2d 505, 507 (9th Cir. 1966); *Shelton* v. *United States*, 292 F. 2d 346, 347 (7th Cir. 1961), *cert. denied*, 369 U. S. 877 (1962). In *Smith* v. *Wainwright*, 373 F. 2d 506, 507-8 (5th Cir. 1967), a case almost identical in its facts to the present appeal, it was stated: "Where the guilty plea has been made after one fifteen-minute conference during which an entire capital case, including an allegedly coerced confession, had to be considered, a hearing is clearly called for to ascertain whether the guilty plea was freely made, without infection from the confession and with 'effective assistance of counsel.'"

The existence or threatened use of a coerced confession may not itself render the guilty plea involuntary. A defendant who has a basis for claiming that his confession was coerced may nevertheless elect to forego that claim and to plead guilty—whether because of "his own knowledge of his guilt and a desire to take his medicine," *Doran* v. *Wilson*, 367 F. 2d 505, 507 (9th Cir. 1966); because "he also knows that other admissible evidence will establish his guilt overwhelmingly," *White* v. *Pepersack*, 352 F. 2d 470, 472 (4th Cir. 1965); because he prefers to plead guilty to a lesser charge rather than run the risk of conviction on a

more serious charge; or because for some other reason he determines that it is in his best interest to plead guilty. A defendant who knowingly and deliberately follows this course should not be in a better position, with regard to the subsequent assertion of such claims on collateral attack, than the defendant who fails to object at trial.

Of course the exploration of these considerations virtually compels disclosure of what occurred between defendant and his counsel. Petitioner, having alleged what was told him and what was not, has waived his privilege against disclosure and his counsel is free to disclose whatever took place between him and his client.

The case is remanded for a hearing to develop all the facts with directions that the hearing be transferred to the Southern District of New York and be held with all reasonable expedition before one of the Judges of said District. In the event that the facts as ultimately found warrant further proceedings, consideration should be given thereto by the appropriate authorities.

On the hearing directed hereby to be held, special attention should be given to the statement given under oath by appellant that he did not plead guilty because he had committed the crime and to appellant's answers on July 22, 1963 under the Court's specific questioning:

> The Court: Now, did you commit this crime?
> The Defendant: Yes, sir.
> The Court: Now, did you on or about March 24, 1963, in the County of New York, wilfully and feloniously strike Rosalie Smith with a knife, thereby causing her death?
> The Defendant: Yes, sir.

Serious charges five years after the event are made under oath against a member of the Bar appointed by the Court to represent appellant in defense of a first degree

murder indictment, which can be summarized as inadequate representation to say the least. Full opportunity should be given to Mr. Rosner and his co-counsel to present their versions of the facts. Appellant and the Assistant District Attorney were also participants in the events of July 22, 1963; the appellant, the notary and probably others in the events of January 15, 1968.

John T. Baker, Esq., whose able representation of appellant is appreciated by this Court, is assigned to represent appellant, Willie Richardson, on the hearing.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 48—September Term, 1968.

(Argued September 10, 1968 Decided March 20, 1969.)

Before:

LUMBARD, *Chief Judge,*
SMITH and ANDERSON, *Circuit Judges.*

Appeal from judgment and order of the United States District Court for the Southern District of New York, Thomas F. Croake, *Judge,* denying without hearing application for writ of habeas corpus.

Reversed and remanded.

GRETCHEN WHITE OBERMAN, New York, N. Y. (Anthony F. Marra, New York, N. Y., on the brief, *for petitioner-appellant.*

MURRAY SYLVESTER, Asst. Attorney General, State of New York (Louis J. Lefkowitz, Attorney General and Samuel A. Hirshowitz, First Asst. Attorney General, on the brief), *for respondent-appellee.*

SMITH, *Circuit Judge:*

This is an appeal by McKinley Williams from an order of the United States District Court for the Southern District of New York, Thomas F. Croake, *J.*, denying, without a hearing, his application for a writ of habeas corpus. Reversed and remanded for a hearing to determine the voluntariness of Williams' guilty plea.

On January 23, 1956, Mabel Cummings was held up with a toy pistol, raped, and robbed. Two days later Williams was arrested, and while in police custody he confessed. On March 16, 1956, he appeared in Bronx County Court and entered a plea of guilty on the advice of his lawyer. On April 19, 1956, Williams was convicted of second degree robbery on his plea of guilty and was sentenced to 7½ to 15 years in prison as a second felony offender. No appeal was taken from the judgment of conviction.

In 1964 petitioner applied for a writ of error *coram nobis* to vacate this conviction. In his petition, Williams stated that he was arrested without a warrant and taken to the Simpson Street police station where he was held on an "open" charge, that he was held for 16 hours before being arraigned, that he was handcuffed to a desk while interrogated by police about a two-day old crime, that he was threatened with a pistol and physically abused, that he was not informed of his right to counsel, and that he gave a confession out of fear and exhaustion. He also alleged that he was inadequately represented by assigned counsel; that he did not want to plead guilty; that his attorney (who was later disbarred), knowing of an alibi defense, talked him into pleading guilty and misled him into thinking that he was pleading guilty to a misdemeanor rather than a felony. He allegedly was not told of the consequences of his plea or the natre or meaning of the charge. Faced with the allegedly coerced confession, and the New York procedure, later declared unconstitutional

in *Jackson* v. *Denno*, 378 U. S. 368 (1964), whereby the jury would determine the voluntariness of his confession, Williams entered the guilty plea.

His writ was denied without a hearing in the state courts, and thereupon Williams applied for a writ of habeas corpus in the United States District Court for the Southern District of New York. Judge Croake denied Williams' petition without a hearing on the basis of *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018, 1019 (2 Cir. 1965), cert. denied 383 U. S. 915 (1966), where we said that "a voluntary plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings." In addition, Judge Croake said that he had some difficulty accepting "the assertion that the right to go to trial was relinquished because [petitioner] believed he would not receive a fair determination on the issue of voluntariness," since Williams entered his plea of guilty almost eight years prior to the Supreme Court decision in *Jackson* v. *Denno, supra.*

In *United States ex rel. Ross* v. *McMann*, Docket No. 32140, slip op. 3853 (2 Cir. February 26, 1969) (*en banc*), and its companion case, *United States ex rel. Dash* v. *Follette*, Docket No. 30420, slip op. 3867 (2 Cir. February 26, 1969) (*en banc*), we held that while a voluntary guilty plea constitutes a waiver of all non-jurisdictional defects, a conviction based on a guilty plea is open to collateral attack if the petitioner can show that the plea was not in fact voluntary. Explaining that it was wrong to read *Glenn* as an absolute bar to collateral attack when there is an issue as to the motivation of the plea, we said that there must be a hearing where the constitutional violations alleged are not irrelevant to the issue of voluntariness. A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is denied. *Machibroda* v. *United States*, 368 U. S. 487, 493

(1969). The applicable principle was stated by the Supreme Court in *Townsend* v. *Sain,* 372 U. S. 293, 312-313 (1969):

> Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair subsidiary hearing in a state court, either in the use of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.

In *Ross* and *Dash* we also rejected the argument that Williams who refused to run the pre-*Jackson* gauntlet was said to have deliberately waived the right to test the voluntariness of their confessions. "The petitioner herein was deemed to have waived his coerced confession and was deliberately by-passing state procedure when the witness failed to afford a constitutionally acceptable reason presenting that claim, and he cannot be deemed and has entered a voluntary guilty plea if the plea was substantially motivated by a coerced confession the validity of which he was unable, for all practical purposes, to contest." *United States ex rel. Ross* v. *McMann, supra* at slip op. 3866.

For the reasons set forth in *Ross* and *Dash,* we think that the allegations in Williams' petition are sufficient to require a hearing on the voluntariness of his guilty plea. He says that he was threatened with a pistol and that he confessed to a "tale" narrated by a plainclothesman. He says that the confession was the only evidence against him, an allegation which, if true, makes this an even stronger case than *Ross* or *Dash.* He says that he was not even in the state at the time of the alleged crime. None of these allegations are controverted by the record.

Unlike *United States ex rel. Rosen* v. *Follette*, Docket No. 32264, slip op. 3907 (2 Cir. February 26, 1969) (*en banc*), therefore, Williams' petition alleges significantly more than the "rather vague claim that the plea was somehow infected by the confession." Slip op. at 3911.

Despite six *coram nobis* applications in New York, Williams has never had a state hearing, and yet plainly the allegations in his petition raise questions which cannot be answered by reference to the transcript alone. If petitioner pleaded guilty on the advice of a lawyer who knew of the existence of a perfectly good alibi defense, then there is certainly some question as to whether Williams was adequately represented by counsel when he entered his guilty plea. "[I]t is not for a lawyer to fabricate defenses, but he does have an affirmative obligation to make suitable inquiry to determine whether valid ones exist." *Jones* v. *Cunningham*, 313 F. 2d 347, 353 (4 Cir.), cert. denied 375 U. S. 832 (1965). See also *Quarles* v. *Balkcom*, 254 F. 2d 985 (5 Cir. 1966), where the Fifth Circuit held that the petitioner, who was incarcerated in a county jail on the date of the alleged crime, was entitled to an evidentiary hearing to show that his guilty plea was a "mistake" and that the plea was induced by inadequate representation of counsel.

Similarly, if petitioner was misled by his lawyer into thinking he was pleading guilty to a misdemeanor, there is some question as to whether the guilty plea was made "intelligently." Compare *United States ex rel. Boucher* v. *Reincke*, 341 F. 2d 977 (2 Cir. 1965). Indeed, the Supreme Court has said that withdrawal of a guilty plea should be allowed if it has been "unfairly obtained or given through ignorance, fear or inadvertence." *Kercheval* v. *United States*, 274 U. S. 220, 224 (1927). Under these circumstances, the petitioner is entitled to an evidentiary hearing to determine whether "the guilty plea was freely

made without infection from the confession and with 'effective assistance of counsel.'" *Smith* v. *Wainwright,* 373 F. 2d 506, 508 (5 Cir. 1967).

This does not mean, of course, that the petitioner will necessarily prevail on the merits, but we think that he has alleged enough to require a hearing. As we said in *Ross* and *Dash,* the conviction would stand if the habeas judge determined either that the confession was voluntary and that petitioner was represented by competent counsel, or if petitioner was unable to show that the plea was substantially motivated by the confession or the alleged incompetence of assigned counsel.

We reserve and remand with instructions to hear and determine petitioner's application unless a hearing is held by the courts of the state determining under the standards set forth herein the issue of the voluntariness of petitioner's plea within 60 days from the date of issuance of the mandate herein, or such further time as the District Court may for good cause allow.

LUMBARD, *Chief Judge* (dissenting):

I dissent.

The majority now require the state court, or perhaps the federal court in addition, to inquire into the voluntariness of a plea of guilty entered by Williams in the Bronx County Court in March 1956 to robbery in the second degree in settlement of an indictment which charged 5 felonies including rape and robbery. The trial court must now also inquire into the voluntariness of the confession which Williams claims he made and which he also claims was the inducing cause of his plea of guilty.

For the reasons set forth in my dissenting opinion in *United States ex rel. Ross* v. *McMann,* slip opinion filed February 26, 1969, at pages 3879 to 3894, I would not re-

quire a trial court to inquire into the voluntariness of a plea of guilty entered in a state court prior to the Supreme Court decision in *Jackson* v. *Denno,* 378 U. S. 368 (1964), where the claim is that the plea was induced by an involuntary confession.

In addition it seems to me that the claims of Williams are insubstantial on their face. It seems highly unlikely on this record that the only evidence against Williams could have been his own confession, as he now claims. The charges in the indictment included holding up one Mabel Cummings with a toy pistol, raping her and robbing her. The record discloses no allegations which make it believable that Mabel Cummins could not and would not have testified that Williams was her assailant. Such testimony would usually be sufficient to convict.

Nor is Williams' claim that he had alibi evidence which would have shown that he was out of the state at the time any more believable, as he gives no particulars whatever with respect to such evidence and to his assertion that he advised his attorney of such an alibi and that his attorney failed to do anything about it.

Williams' petition is unbelievable in still another respect—his claim that his lawyer led him into thinking he was pleading to a misdemeanor when he pleaded to robbery in the second degree. This claim is especially incredible in light of the facts that Williams was a second felony offender and that he failed to raise the claim for 8 years.

Of course the state has not yet had reason to refute these claims Williams makes because at the time Judge Croake passed upon them and dismissed the petition without hearing this court had not yet announced its opinion in *United States ex rel. Ross* v. *McMann* and related cases. I point out the insubstantiality of the claims not only to emplasize that, in my opinion, there was no need to make

any answer to Williams' claims, but also because it seems to me that even under the holding of the majority, and what the majority members of this court said in *United States ex rel. Ross* v. *McMann,* it might still be possible for the state to present record evidence of such nature that the petition could be acted upon and dismissed without the calling of any witnesses.

I also refer to these glaring defects in Williams' petition to emphasize the point I made in my dissenting opinion in *Ross* that New York State courts, and subsequently our own federal courts, will be overburdened by the requirement that they spend valuable time in listening to insubstantial claims regarding events so far in the past that memories and records will be so imperfect and incomplete that the court can do little but speculate. Undoubtedly trial judges who must listen to such claims will be able, readily and speedily in the great majority of cases, to determine that the claims are incredible and almost entirely an exercise in imagination prompted by the reading of opinions, such as those in *Ross,* which suggest facts justifying relief.

I would affirm the judgment of the district court which denied the petition without a hearing.

JUN 18 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 153

DANIEL McMANN, Warden of Clinton Prison, Dannemora, New York and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

against

WILBERT ROSS, WILLIE RICHARDSON, FOSTER, DASH and McKINLEY WILLIAMS,

Respondents.

BRIEF OF DISTRICT ATTORNEY OF NEW YORK COUNTY, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR CERTIORARI

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RE 2-7300

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1436

DANIEL McMANN, Warden of Clinton Prison, Dannemora, New York and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

against

WILBERT ROSS, WILLIE RICHARDSON, FOSTER DASH and McKINLEY WILLIAMS,

Respondents.

BRIEF OF DISTRICT ATTORNEY OF NEW YORK COUNTY, *AMICUS CURIAE,* IN SUPPORT OF PETITION FOR CERTIORARI

Introduction—Interest of *Amicus*

The District Attorney of New York County supports the petition for a writ of certiorari filed by the Attorney General of the State of New York, not only because one of the respondents was convicted in New York County of a serious crime, but because the issue presented directly affects the cases of numerous State prisoners who, being

the worst offenders, are still in custody. For example, on an entirely conclusory habeas corpus claim that "he was coerced into signing a statement and confessing the crime" (petition for certiorari, Appendix A, p. 30), respondent Wilbert Ross, an acknowledged murderer on whose behalf the Circuit court entered its principal ruling, has been granted an evidentiary hearing on the issue of voluntariness of the "statement," notwithstanding the complete absence of any claim of coercion before the case became final, and although the "statement," if any, was never introduced in evidence, since Ross pleaded guilty. Thus the Circuit court, repudiating long-standing decisions of the New York Court of Appeals, has needlessly extended to countless State prisoners an open invitation to come to the courtroom for a hearing in cases which were reasonably considered closed, an invitation redeemable merely upon presentation of easily drafted claims as to inadmissibility of evidence, and as to the subjective "motivation" for pleas of guilty.

ARGUMENT

Jackson v. *Denno* should not be applied retroactively to defendants who pleaded guilty.

The United States Court of Appeals for the Second Circuit, by a 6-3 vote, has expanded drastically the opportunity to attack a conviction based upon a plea of guilty, if the plea was entered prior to *Jackson* v. *Denno*, 378 U.S. 368 (1964). The Court ruled that an evidentiary hearing is required in a State court when a petitioner alleges sufficiently that his plea of guilty, entered before the *Jackson* ruling on June 22, 1964, was "substantially motivated" by

a coerced confession. "The conviction would stand, of course," the Circuit court reassured, "if the State court found after full and fair evidentiary hearing, either that the confession was voluntary or that the plea was not substantially motivated by the confession" (*id.* at n. 4).

The crux of the Court of Appeals' decisions was that a non-jury hearing as to voluntariness of a confession, "constitutionally acceptable" under present standards, was not required and available in New York State until the *Jackson* decision, nine years after the respondent Ross's plea of guilty (petition for certiorari, Appendix B, pp. 57, 59-60; see also concurring opinion, pp. 66-7). Hence, a *Jackson-Denno* hearing was not deliberately "waived" by the plea. *Ergo*, the plea of guilty is tainted. This syllogism, the last word of the federal courts in this jurisdiction,* has devastating logical consequences. Under the reasoning of the Circuit court, every judgment entered upon a plea of guilty is subject to attack if subsequently there was a change in the constitutional law relating to criminal procedure or admissibility of evidence. In this instance, respondents were held to be entitled retroac-

* The decisions of the United States Court of Appeals for the Second Circuit are, of course, binding upon the District Courts in the Circuit, from which State prisoners may seek writs of habeas corpus. Further, the reasoning of the decisions would extend to cases of State prisoners convicted in at least 14 states other than New York, and federal prisoners convicted in 6 federal judicial circuits, for these jurisdictions lacked an acceptable *Jackson*-type hearing prior to June 22, 1964. See *Jackson* v. *Denno*, *supra* at 400 (dissenting opinion of Mr. Justice BLACK). Some New York State trial judges, unpersuaded by the logic of the Circuit court in the instant cases, have declined to hold hearings on similar petitions, pending further word as to the efficacy of these holdings. See, *e.g.*, *People* v. *Terry*, N.Y.L.J. April 22, 1969, p. 18, col. 6 (Sup. Ct. 1969); *People* v. *Serra*, N.Y.L.J. June 4, 1969, p. 33, col. 8 (Sup. Ct. 1969).

tively to a *Jackson* hearing since none was available when they pleaded guilty. By the same token, defendants who pleaded guilty prior to *Bruton* v. *United States*, 391 U.S. 123 (1968) would be entitled to petition for an evidentiary hearing to determine whether their pleas were "substantially motivated" by an expectation that they would be tried jointly with other defendants whose confessions implicated them.

In so ruling, the Court of Appeals misconstrued the nature of the "waiver" which underlies an acceptable plea of guilty. The validity of a plea of guilty in cases disposed of prior to 1964 is totally unaffected by the absence of a deliberate, intentional "waiver" of a *Jackson* hearing. The only previously announced constitutional rights which must be knowingly and understandingly "waived" for the plea of guilty to be accepted are the rights recently listed by this Court in *Boykin* v. *Alabama*, —— U.S. ——, 37 USLW 4474 (1969):

> "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy* v. *Hogan*, 378 U.S. 1. Second is the right to trial by jury. *Duncan* v. *Louisiana*, 391 U.S. 145. Third, is the right to confront one's accusers. *Pointer* v. *Texas*, 380 U.S. 400." *Id.* at 4476.

Moreover, defendants need not be shown to have knowingly waived every procedural right which subsequent judicial decisions have added. In effect, a plea of guilty relinquishes the benefit of subsequently announced procedural rights

which, as here, do not affect the reliability of the plea of guilty—even if those rights are applied retroactively to cases where there was a trial. This is implicit in the bargain which is struck when a defendant foregoes his right to a trial, as in the instant cases, in return for the benefits of a lesser plea. As this court recently noted, "some defendants benefit from the new rule while others do not, solely because of the fortuities that determine the progress of their cases from initial investigation and arrest to final judgment. The resulting incongruities must be balanced against the impetus the technique [prospective decision-making] provides for the implementation of long overdue reforms, which otherwise could not be practicably effected." *Jenkins* v. *Delaware*, —— U.S. ——, 37 USLW 4458, 4459 (1969). Indeed, one wonders whether this Court, which was closely divided in *Jackson*, could have contemplated that its novel decision would be construed to require evidentiary hearings as to the admissibility of evidence at trial where there never was a trial. In a criminal justice system which disposes of "about 80% of all charges of serious crime and of about 95% of all convictions of such crimes" by pleas of guilty, and which encourages progress and procedural reforms through judicial decisions, any other view is intolerable and not constitutionally required (*cf.* petition for certiorari, Appendix B, page 72 [dissenting opinion of LUMBARD, C.J.]).

The Circuit court's decisions in the instant cases not only misinterpret the "waiver" implicit in a plea of guilty, they conflict with settled principles of retroactivity, which establish the inapplicability of new rulings such as *Jackson* v. *Denno* to cases which had already been disposed of

upon pleas. In determining questions of retroactivity, this Court has applied three now familiar criteria:

> "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967); see also *Haliday* v. *United States*, U.S. , 23 L.Ed.2d 16, 19 (1969).

Applying these tests, it has been held that the application to State trials of the Sixth Amendment right to a jury trial for serious offenses is not retroactive to trials which have already occurred without a jury. *DeStefano* v. *Woods*, 392 U.S. 631 (1968). Judicial extension of the right to counsel at pre-trial identification proceedings is inapplicable to line-ups which have already occurred. *Stovall* v. *Denno*, *supra*. The *Miranda* decision does not apply to trials that had already begun when the Supreme Court prescribed the *Miranda* warnings, or to retrials of cases which originally had been tried prior to the *Miranda* decision. *Jenkins* v. *Delaware*, *supra*; *Johnson* v. *New Jersey*, 384 U.S. 719 (1966). Similarly, recent changes in rulings as to the admissibility of evidence obtained by wire-tapping do not apply to wire-tapping which has already occurred. *Desist* v. *United States*, 394 U.S. 244 (1969).

With respect to the first criterion of retroactivity, the purpose of the *Jackson* decision was provision for a "reliable" procedure for testing federal claims as to voluntariness of a confession "offered in evidence at the trial." 378 U.S. at 377. Retroactivity is not indicated where there was no trial at all, and no pre-trial confession was ad

vanced as proof. A plea of guilty "serves as a stipulation that no proof by the prosecution need be advanced . . . It supplies both evidence and verdict, ending the controversy . . . ." *Boykin* v. *Alabama*, *supra*, 37 USLW at 4476, n. 4. Since requiring hearings before judges without a jury on the question of voluntariness of a confession offered at trial does not involve the reliability of the judgment rendering process where the judgment is based on a plea of guilty, there is no need for retroactivity. By contrast, the holding in *Gideon* v. *Wainright*, 372 U.S. 335 (1963), that indigent defendants are entitled to free counsel, deserved retroactive application even where the convictions rested upon pleas of guilty, for the reliability of an uncounseled plea of guilty is suspect. But it is difficult to conceive of any other case involving newly announced rights applicable to a trial, which should be applied retroactively to pleas of guilty. Indeed, the majority of the court below suggests not one whit that its ruling is related to the reliability of the plea of guilty. Nor did the respondents suggest in their habeas corpus petitions any relationship between the reliability of their pleas of guilty and the unavailability of a *Jackson* hearing prior to 1964, when their pleas were entered. The remoteness from the question of reliability of the plea is highlighted by considering the status of the law when the plea was entered, prior to the *Jackson* decision. In 1956, when respondent Ross pleaded, methods reasonably considered adequate were available for testing voluntariness of confessions offered at trial, as was pointed out below in the dissenting opinion of Judge Thomsen. Hence, the unavailability of an alternative method could not have affected the truthfulness of the plea.

It is also clear that the second test of retroactivity, reliance by public officers, warrants prospectivity of *Jackson* where there was a plea of guilty. Judges, prosecutors, and others responsible for the administration of justice were entitled to rely on authoritative pronouncements by this Court and the New York Court of Appeals upholding the existing State procedure for testing voluntariness of confessions that were offered at trial. See *Stein* v. *New York*, 346 U.S. 156 (1953); see also *Jackson* v. *Denno*, *supra* at 395. The court below offered no suggestion as to how a plea of guilty could have been taken in 1955 in a manner which would now be considered acceptable by a majority of that court.

Finally, substantial disruption in the administration of justice would occur if cases disposed of upon pleas of guilty prior to 1964 had to be reopened for evidentiary hearings as to the admissibility of evidence. The petition for certiorari and the dissenting opinion of Chief Judge Lumbard document the enormous number of convictions which would be affected by the broad rulings of the Second Circuit.

It is no reassurance to assert, as was done in the majority opinion in the *Linkletter* case, that after a "full . . . evidentiary hearing" the conviction could stand if "the confession was voluntary" or "the plea was not substantially motivated by the confession." Requiring hearings is itself a disruptive factor. To add innumerable such cases to the calendars of the Supreme Court in New York City and other busy trial courts, where the backlogs of indictments awaiting trial are already large (in New York

County the typical homicide case is tried a year after the indictment), is an unreasonable, unnecessary burden on the administration of justice. With the facilities of the courts, prosecutors, police and defense bar already overtaxed with pre-trial hearings on issues created by recent decisions, an additional weight should not be imposed without urgent reasons not apparent in the present case. Nor may it lightly be assumed that the issues set forth by the Circuit court could readily be litigated. In cases at least 5 years old, the voluntariness of the confession, and even its very existence, are questions not readily susceptible of resolution in cases entered upon pleas of guilty, where testimony and records have not been preserved, and memories are understandably stale. Similarly, an evidentiary hearing as to whether a plea of guilty prior to 1964 was "substantially motivated" by a confession is an inquiry into the metaphysical. Indeed, if the Circuit court's opinion in *Ross* is carried to its logical conclusion, the defendant should prevail if he thought the confession was "coerced" and pleaded guilty substantially because of the confession, regardless whether or not the confession was in fact voluntary.

Assuming that this examination as to the confession, or as to the motivation for the plea, resulted in a nullification of the plea of guilty, the State would be seriously handicapped in its efforts to prosecute the underlying criminal charge. The Circuit court overlooked "society's legitimate concern that convictions already validly obtained not be needlessly aborted." See *Jenkins* v. *Delaware*, *supra*, 37 USLW at 4460. In *Jenkins*, this Court was persuaded substantially by "the increased evidentiary burden

that would result if we were to insist that *Miranda* be applied to retrials." *Ibid.* Similarly, "because of the increased evidentiary burden that would be placed unreasonably upon law enforcement officials" [*ibid.*] by insisting that *Jackson* v. *Denno* be applied retroactively to cases previously disposed of upon pleas of guilty, the *Jackson* case should not apply in the cases at bar.

Plainly, the opinion of the Court of Appeals in the *Ross* case is wholly inconsistent with the recent decision of this Court in *Halliday* v. *United States*, ——U.S.——, 23 L.Ed.2d 16 (1969). Shortly before *Halliday*, this Court had held that when a guilty plea is accepted in a federal court in violation of Rule 11 of the Federal Rules of Criminal Procedure, the defendant must be afforded an opportunity to plead anew. *McCarthy* v. *United States*, ——U.S.——, 22 L.Ed.2d 418 (1969). *Halliday* held that *McCarthy* should not be applied to guilty pleas which were accepted prior to the date of the *McCarthy* decision. While acknowledging that strict compliance with Rule 11 unquestionably "enhances the reliability of the voluntariness determination," the Court reaffirmed its pronouncement in *Stovall* v. *Denno*, *supra*, that the extent to which a "'condemned practice affects the integrity of the truth-determining process' must be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice." 23 L.Ed.2d at 20. In the case at bar, the absence of *Jackson* hearings prior to 1964 did not affect the truthfulness of the plea, reliance on the pleading process prior to *Jackson* was clearly justified, and the disruptive impact of retroactivity would be staggering. And since *McCarthy*,

which was designed to enhance the determination of the voluntariness of a judicial confession of guilt, is not retroactive, it follows that *Jackson*, which was designed to facilitate the determination of the voluntariness of a pre-trial confession, should not be retroactive where the conviction rests on a plea of guilty, not on the pre-trial confession. Since *Jackson* does not warrant retroactive application in such cases, the unavailability of *Jackson* hearings has no constitutional significance in assessing a plea of guilty which was entered before *Jackson*. And with *Jackson* removed from consideration, the decisions of the Circuit court crumble.

Conclusion

The petition for certiorari should be granted and the judgments of the Court of Appeals reversed.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

MICHAEL R. JUVILER
BENNETT L. GERSHMAN
Assistant District Attorneys
Of Counsel

June, 1969

IN THE

Supreme Court of the United States

October Term, 1969

No. 153

DANIEL McMANN, Warden of Clinton Prison, Dannemora, New York, and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

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BRIEF OF DISTRICT ATTORNEY OF NEW YORK COUNTY, *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

October Term, 1969

No. 153

BRIEF OF DISTRICT ATTORNEY OF NEW YORK COUNTY, *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

Introduction—Interest of *Amicus*

Question Presented

ARGUMENT

Jackson v. _Denno_ should not be applied retroactively to defendants who pleaded guilty.

the reasoning of the Circuit court, every judgment entered upon a plea of guilty is subject to attack if subsequently there is a change in the constitutional law relating to criminal procedure or admissibility of evidence. In this instance, respondents were held to be entitled retroactively to a *Jackson* hearing, since none was available when they pleaded guilty. By the same token, defendants who pleaded guilty prior to *Bruton* v. *United States*, 391 U.S. 123 (1968), would be entitled to petition for an evidentiary hearing to determine whether their pleas were "substantially motivated" by an expectation that they would be tried jointly with other defendants whose confessions implicated them.

In so ruling, the Court of Appeals misconstrued the nature of the "waiver" that underlies an acceptable plea of guilty. The validity of a plea of guilty in cases disposed of prior to 1964 is totally unaffected by the absence of a deliberate, intentional "waiver" of a *Jackson* hearing. Indeed, the only *prerequisite* announced constitutional rights that must be knowingly and understandingly "waived" for the plea of guilty to be accepted are, at most, the rights recently enumerated by this Court in *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969).

> "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy* v. *Hogan*, 378 U.S. 1. Second, is the right to trial by jury. *Duncan* v. *Louisiana*, 391 U.S. 145. Third, is the right to confront one's accusers. *Pointer* v. *Texas*, 380 U.S. 400."

Moreover, defendants need not be shown to have knowingly waived every procedural right that *subsequent* judicial decisions have added. In effect, a plea of guilty relinquishes the benefit of subsequently announced procedural rights that, as here, do not affect the reliability of the plea of guilty—even if those rights are applied retroactively to cases where there was a trial. This is implicit in the bargain which is struck when a defendant foregoes his right to a trial, as in the instant cases, in return for the benefits of a lesser plea. As this court recently noted, "some defendants benefit from the new rule while others do not, solely because of the fortuities that determine the progress of their cases from initial investigation and arrest to final judgment. The resulting incongruities must be balanced against the impetus the technique [prospective decision making] provides for the implementation of long overdue reforms, which otherwise could not be practically effected." *Desist* v. *United States*, 394 U.S. 244, 248 (1969). One wonders whether this Court, which was closely divided in *Jackson*, could have contemplated that its novel decision would be construed to require evidentiary hearings as to the admissibility of evidence at trials where there never was a trial. In a criminal justice system which disposes of "about 90% of all charges of serious crime and of about

Conclusion

The judgments of the Court of Appeals should be reversed.

Respectfully submitted,

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District Attorney
New York County

MICHAEL R. JUVILER
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Of Counsel

December, 1969

100 Defendants Who Pleaded Guilty in Non-Homicide Felony Cases prior to *Jackson* v. *Denno*

The following 100 cases, selected at random from the files of the New York County District Attorney's Office, involve indicted defendants who pleaded guilty prior to June 22, 1964, the date of *Jackson* v. *Denno*, 378 U.S. 368.

In 83% of these cases, the defendant had made a statement to the police.

Defendant	*Indictment Number*	*Date of Plea*	*Statement to Police*
1. Kenneth Curtis	333-58	2/28/58	X
2. Edward Thompson	806-58	3/21/58	X
3. James Felder	1764-58	6/11/58	X
4. Hewie Chavers	2367-58	7/22/58	X
5. Leroy Nelson	2763-58	8/20/58	
6. Angelo Gonzalez	1272-58	9/17/58	X
7. Hector Laboy	3144-58	9/26/58	X
8. Arthur Simonson	3719-58	12/23/58	X
9. George Hill	4205-58	12/27/58	X
10. Frank Auleta	447-59	2/26/59	X
11. John Frost	65-59	3/3/59	X
12. William Davis	507-59	3/4/59	X
13. Carl Hendrix	403-59	3/20/59	X
14. Everett James	542-59	4/17/59	X
15. John Cramer	988-59	5/6/59	X
16. Irving Bowen	1475-59	5/14/59	X
17. Arthur Gould	1665-59	5/20/59	X
18. Caroline Chu	1616-59	6/8/59	X
19. Grace Collins	1299-59	6/8/59	X
20. Philip Walker	2287-59	7/29/59	X

Defendant	*Indictment Number*	*Date of Plea*	*Statement to Police*
21. Pacfuzo Davilar	2382-59	8/26/59	X
22. Carlos Vasquez	3013-59	9/11/59	X
23. (Bruno Boone	685-59	10/8/59	X
24. (Haywood Boykin	685-59	10/8/59	X
25. John Bocca	943-59	10/14/59	X
26. Cannon Smith	3694-59	10/27/59	X
27. Norman Bell	2212-59	12/1/59	X
28. Freddie Butler	4234-59	12/24/59	X
29. Helen Bivines	4955-59	1/22/60	X
30. Edward Stewart	345-60	2/15/60	X
31. Carmello Ortiz	684-60	2/26/60	X
32. (Ernest McCullough	507-60	3/2/60	
33. (Raymond Pittman	507-60	3/2/60	
34. John McCoach	1048-60	4/4/60	X
35. Trudel Halman	781-60	4/7/60	X
36. James S. Johnson	1383-60	5/16/60	X
37. John Sawyer	1702-60	6/3/60	X
38. Joseph Weaver	2703-60	6/29/60	X
39. Miguel Sanchez	3390-60	9/20/60	X
40. Romulus Staton	2170-60	10/24/60	X
41. Pedro Roman	2454-60	10/27/60	X
42. Roger King	4382-60	11/16/60	X
43. Alexander Alick	4636-60	12/8/60	
44. Agnes Collins	4115-60	1/17/61	X
45. Eduardo Cepero	203-61	1/27/61	X
46. Seamon Drayton	5174-60	1/29/61	
47. William Hernandez	497-61	4/5/61	X

48. Mita Petrov	1056-61	4/27/61	X
49. Randolph Scott	5374-60	5/4/61	X
50. Herman Mayo	1337-61	5/10/61	
51. (Multry Ward	1733-61	5/16/61	X
52. (Chester Jackson	1733-61	5/16/61	X
53. Ronald Lewis	1935-61	6/21/61	X
54. Waldo Wilson	2509-61	7/13/61	X
55. James Rodgers	2765-61	8/14/61	X
56. Bernardo Jones	3304-61	9/27/61	X
57. Joseph Bernesser	3574-61	10/26/61	X
58. John Corry	3554-61	11/21/61	X
59. Edward Miles	4382-61	12/19/61	
60. Norval Finney	3865-61	1/8/62	
61. Louise Butler	3078-61	2/2/62	X
62. Ephraim Santo	1781-62	2/19/62	X
63. Vencencio Tilano	23-62	2/20/62	X
64. Seymour Berg	4703-61	2/28/62	
65. Clarence Haynes	364-62	3/7/62	X
66. James Gigueroa	435-62	3/16/62	
67. (Isaac Thompson	835-62	3/19/62	X
68. (Alfred Jacobus	836-62	3/19/62	X
69. Fernando Moulier	717-62	3/23/62	
70. Elmer Witcher	904-62	4/13/62	X
71. Nancy Reid	702-62	4/13/62	X
72. Anthony Madalno	259-62	4/30/62	X
73. Nathan Westpoint	1455-62	5/17/62	X
74. James Jones	897-62	6/20/62	
75. Henry Le Clair	1872-62	6/22/62	X

	Defendant	*Indictment Number*	*Date of Plea*	*Statement to Police*
76.	Michael Amengual	2404-62	6/28/62	X
77.	Julio Marrero	3307-62	8/30/62	
78.	Robert B. Taylor	3400-62	9/26/62	
79.	Jesus Rivera	3971-62	11/23/62	X
80.	Miguel Lamboy	4100-62	11/23/62	X
81.	David Simon	2921-62	12/10/62	X
82.	Stanley Spearman	4569-62	1/8/63	X
83.	Frank Torres	174-63	2/19/63	X
84.	Oswald White	506-63	3/7/63	X
85.	Robert Lewis	993-63	4/5/63	X
86.	Robert Fagan	802-63	4/15/63	
87.	Curtis Harris	1618-63	5/23/63	X
88.	Eleodow Santell	1265-63	5/24/63	X
89.	Heywood Kirk	2508-63	7/15/63	
90.	William Robinson	2150A-63	7/23/63	X
91.	Ruiz Santos Valentin	3673-63	10/17/63	X
92.	Harold Buffaloe	2792-63	10/25/63	
93.	John E. Bozulis	4101-63	11/14/63	X
94.	Mel Cole	4001-63	11/19/63	X
95.	Raymond Brooks	597-64	2/25/64	X
96.	Louise Caloca	1095-64	4/3/64	X
97.	Henry Hymes	559-64	4/15/64	X
98.	Emory Schreiber	942-64	4/22/64	X
99.	Samuel Irizzary	564-64	4/27/64	X
100.	Luciano Barcone	1452-64	6/18/64	X

UPREME COURT, U. S.

FILED

DEC 13 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 153

DANIEL McMANN, Warden of Clinton Prison, Dannemora, New York and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

against

WILBERT ROSS, WILLIE RICHARDSON, FOSTER DASH and McKINLEY WILLIAMS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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POINT II—The reliance below on *Jackson* v. *Denno*, 378 U. S. 368 (1964), to call into question all guilty pleas entered prior to the decision in that case where the existence of a coerced confession is alleged, is unfounded. In any event, *Jackson* v. *Denno* should not be retroactively applied to guilty plea cases 40

POINT III—The new rule announced below was inappropriately announced for the first time on federal habeas corpus. Moreover, the opinion sets forth no adequate guidelines for the conduct of the hearings which it mandates 50

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 153

DANIEL MCMANN, Warden of Clinton Prison, Dannemora, New York and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

against

WILBERT ROSS, WILLIE RICHARDSON, FOSTER DASH and MCKINLEY WILLIAMS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The majority and dissenting opinions of the Court of Appeals for the Second Circuit in *United States ex rel. Ross* v. *McMann* (hereinafter *Ross*) (A. 109-161)* are reported at 409 F. 2d 1016. The District Court opinion (A. 14-16) is not reported. The state courts wrote no opinions in denying *coram nobis* relief. The affirmance

* Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix in this Court.

of the Appellate Division is reported at 272 N.Y.S. 2d 969 (not officially reported).

The majority and dissenting opinions of the Second Circuit in *United States ex rel. Dash* v. *Follette* (hereinafter *Dash*), decided together with *Ross* (A. 109-161), are reported at 409 F. 2d 1016. The opinion of the District Court (A. 37-38) is not reported. The order of the Appellate Division, affirming the denial of *coram nobis* relief is reported at 21 A. D. 2d 978. The opinion of the New York Court of Appeals affirming that denial is reported at 16 N. Y. 2d 493, 208 N. E. 2d 171.

The opinion of the Second Circuit in *United States ex rel. Richardson* v. *McMann* (hereinafter *Richardson*) (A. 162-172), is reported at 408 F. 2d 48. The opinion of the District Court (A. 83-87) is not reported. The state court wrote no opinions in denying *coram nobis* relief. The order affirming the denial is reported at 23 A. D. 2d 969.

The majority and dissenting opinions of the Second Circuit in *United States ex rel. Williams* v. *Follette* (hereinafter *Williams*) (A. 173-180), are reported at 408 F. 2d 658. The opinion of the District Court (A. 71-72) is not reported. The opinion of the state trial court (A. 59-60) in denying *coram nobis* relief is not reported. The order affirming the denial is reported at 25 A. D. 2d 620.

Jurisdiction

The judgments of the United States Court of Appeals in the *Ross, Dash* and *Richardson* cases were entered on February 26, 1969. The judgment in the *Williams* case was entered on March 20, 1969. The petition for certiorari was filed on May 24, 1969. Certiorari was granted on October 13, 1969.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented

1. Does an allegation that an otherwise voluntary plea of guilty was induced by the existence of evidence alleged now to have been illegally obtained state a claim which, if proved, would warrant relief by way of federal habeas corpus?

2. Should the rule of *Jackson* v. *Denno*, 378 U. S. 368 (1964) be held applicable to convictions based not on evidence in general or confessions in particular but on pleas of guilty entered before the decision in that case?

3. Was it appropriate to apply automatically the new rule announced below to cases which were final before it was announced?

4. Does the new rule announced below provide the necessary procedural guidelines for the allegations required to mandate an evidentiary hearing and for the conduct of the hearings themselves?

Statement of the Case

Respondents in these cases are four New York State prisoners* all convicted by virtue of their pleas of guilty to reduced charges from over six to nearly fifteen years ago.** All were represented by counsel before conviction

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* Since the decision below, Wilbert Ross has died. Although his case is now moot, it is discussed herein because the decision in *Ross* is the basis for the decision in the remaining three cases.

** Wilbert Ross was convicted in Kings County on March 14, 1955 of the crime of murder in the second degree to cover an indictment charging murder in the first degree. He was sentenced to a term of from 45 years to life in prison. Willie Richardson was convicted in New York County on October 9, 1963 of the crime of murder in the second degree to cover an indictment charging two counts of

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and through sentence. None appealed from the judgment of conviction.

Within periods ranging from eight months (Richardson) to ten years (Ross) after conviction, each brought a collateral attack against his conviction by way of coram nobis in the state trial court alleging in conclusory fashion a series of claimed errors infecting his plea. The applications were denied without hearings, the denials were affirmed by the Appellate Division and leave to appeal to the Court of Appeals was denied in *Ross, Richardson* and *Williams*. Leave was granted in *Dash* and the denial of relief affirmed in an opinion.*

Each respondent subsequently applied to a federal district court for habeas corpus relief. Each presented a series of conclusory, *pro forma* and not entirely consistent allegations which the district courts have come to recognize as typical in guilty plea cases.

The Ross Petition:

In a petition dated May 18, 1967, Wilbert Ross sought habeas corpus in the United States District Court for the Eastern District of New York, claiming that "the existence of a certain written inculpatory statement (hereinafter

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murder in the first degree. He was sentenced to a term of from 30 years to life in prison. Foster Dash was convicted in Bronx County on April 6, 1959 of robbery in the second degree to cover an indictment charging robbery in the first degree, grand larceny and assault. He was sentenced as a second felony offender to a term of from 8 to 12 years in prison. McKinley Williams was convicted in Bronx County on March 16, 1956 of the crime of robbery in the second degree to cover an indictment charging robbery in the first degree. He was sentenced to a term of from 7½ to 15 years in prison.

* *People* v. *Ross*, 272 N.Y.S. 2d 969 (2d Dept. 1966), *lv. den.* January 10, 1967; *People* v. *Dash*, 21 A. D. 2d 978 (1st Dept. 1964) *affd.* 16 N. Y. 2d 493, 208 N. E. 2d 171 (1965); *People* v. *Richardson*, 23 A. D. 2d 969 (1st Dept. 1965), *lv. den.* June 8, 1965; *People* v. *Williams*, 25 A. D. 2d 620 (1st Dept. 1966).

confession), which was given after the uttering of threats by police officials, served to aggravate the force of the threats which induced the plea . . ." (A. 2-3). He claimed that, in May, 1954, while in custody on a larceny charge he was taken by two detectives to the District Attorney's office and questioned about a murder committed a month and a half before. When he denied knowledge of the murder, he was told that his accomplice had confessed and that unless he told his story he would be sent to the electric chair for murder and kidnapping. Ross said that while he was persisting in his denial, detectives came quietly into the room until "at one time there were fourteen in all" (A. 4-5). Ross was permitted to hear, by means of an intercommunication device, his accomplice telling the police of Ross' participation in the murder. The detectives told him that the accomplice would testify and he would be electrocuted. His request to see an attorney having been denied, he gave a statement which was reduced to writing and which he signed (A. 6-7). Two days later he told the detectives where to find the gun and gave another statement, this time to the district attorney. He was not advised of his right to counsel or to remain silent and did not at this time ask for counsel (A. 8-9).

In October, 1954, while in state prison on the larceny charge he was returned to Kings County and arraigned on a first degree murder charge. A month later he was visited by an assigned attorney who did not ask him about the charge but only about his background (A. 9). About five or six weeks later the lawyer visited him again and Ross told him that he wanted to suppress the confession. The lawyer said "that that was completely out of the question and that at any rate the District Attorney had the gun, that nothing had changed, that Jenkins would tell his story to the jury, and that his testimony, backed up by the confession and the gun, would be enough to make 'a jury of twelve cousins' convict me and send me to the electric chair. He told me that he would 'get the

best possible break' for me from the District Attorney, but that I 'would be dead by the Fourth of July' if I risked a trial" (A. 9). In February, 1955 his lawyer told him that he could plead guilty to murder in the second degree and receive a sentence of from twenty years to life. "If I insisted on going to trial, well, he was my lawyer and would do what he could" but " 'there isn't a pair in the world to beat four aces'" (A. 10). Ross pleaded guilty to murder in the second degree and was sentenced to forty-five years to life in prison (A. 2).

The Dash Petition:

On October 4, 1965, Foster Dash applied for a writ of habeas corpus to the United States District Court for the Southern District of New York, claiming that, on February 26, 1959, he was arrested in New York City and brought to a police station, where a group of officers "began to beat and question relator about various crimes allegedly committed in New York County. Relator denied having knowledge of any crime, and thereupon, requested counsel to protect him in his constitutional rights" (A. 24).*

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*On February 9, 1959, a Mr. Schedletsky was held up and robbed by three men, at least one of whom was armed. Immediately after the crime one Fields was apprehended and, apparently, implicated Dash and two others, Waterman and Devine. On February 24, 1959, an indictment was returned in Bronx County charging Fields as a defendant and conspirator and naming the three robbers as "John Doe", "Richard Roe" and "Peter Loe". See *People v. Waterman*, 12 A. D. 2d 84, 208 N.Y.S. 2d 596 (1st Dept. 1960). After the indictment, and while in custody, Waterman was questioned by a detective to whom he made a complete confession also implicating Devine, Fields and Dash. See *People* v. *Waterman*, 9 N. Y. 2d 561, 175 N. E. 2d 445 (1961).

Waterman and Devine were tried and convicted of robbery in the first degree, grand larceny in the second degree and assault in the first second degree and were sentenced on December 1, 1959 to terms of from 15 to 20 years in prison. Dash and Fields pleaded guilty. Dash received a sentence of from 8 to 12 years as a second

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Dash contended that he was then taken to the Bronx where he was "beaten and questioned in incessant relays" and that he maintained his innocence and repeated his request for an attorney. He said that he was "held incommunicado for 7½ hours" and then taken to the office of the Assistant District Attorney who denied his request for counsel, who told him that he had already been indicted and said that if he did not cooperate he "would then fix it so that every crime that was then unsolved would be 'yours'" (A. 24-25). Dash then signed a "prefabricated confession" (A. 25).

On March 16, 1959, in Court, Dash rejected a plea to the highest charge in the indictment, robbery in the first degree, although his lawyer told him that "due to the confession" he should take it (A. 25). On April 1, 1959, in Court, the trial judge allegedly told him that he would receive the maximum penalty if he went to trial (A. 26) although "this statement of the trial court was not made on the open record" (A. 30). On April 6, 1959, Dash entered a plea of guilty to robbery in the *second* degree.

Dash additionally pointed out in his petition that his plea was entered before the decision of this Court in *Jackson* v. *Denno*, 378 U. S. 368 (1964) which he construed as meaning "that the only choice remaining to him . . . was to proceed to trial in the hope of challenging the admissibility of the alleged coerced confession" (A. 29).

The Williams Petition:

By application dated July 8, 1966, McKinley Williams sought habeas corpus in the United States District Court

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felony offender (A. 23). The convictions of Waterman and Devine were reversed on the ground that it was error to admit into evidence the post-indictment statements taken in the absence of counsel. (*People* v. *Waterman*, *supra*, 12 A. D. 2d 81, 9 N. Y. 2d 561). Thereafter, Waterman and Devine pleaded guilty to assault in the second degree and were sentenced to terms of from 2½ to 5 years in prison.

for the Southern District of New York. He claimed that he was arrested on January 25, 1956 in the Bronx "on an open charge" and not informed of any rights. The brief submitted on Williams' behalf in the Appellate Division, First Department on appeal from the denial of *coram nobis* and annexed as an exhibit to the habeas corpus petition, quotes the *coram nobis* petition as stating that while Williams was in custody, the police ". . . initiated to assault, intimidate and terrorize petitioner while intensively interrogating him about a two-day old alleged robbery . . . the inquisition, accompanied by threats, led by a detective known to petitioner as Michael Cleary, while petitioner was handcuffed to a desk and chair, continued without let-up until the next morning, and was climaxed by a pistol being brandished in petitioner face, by the said detective Cleary, and threatened to be *shot dead!*" Williams said that, out of fear and exhaustion he "capitulated and agreed to what actually consisted of agreeing to a tale narrated to him by police and later by a plain-clothesman" who afterward represented himself to be an Assistant District Attorney. The *coram nobis* brief alleged that Williams was inadequately represented by counsel, that he had an alibi in that he was out of the state on the day the crime took place and that counsel told him he was pleading guilty to a misdemeanor. In discussing Williams' coerced confession claim, the *coram nobis* brief contended that Williams was precluded from going to trial by the actions of his attorney in misleading him, and for no other reason.

In his habeas corpus application Williams, self-described as a "20 year old indigent youth" (A. 49), contended for the first time that since he was convicted prior to *Jackson* v. *Denno*, 378 U. S. 368 (1964), "he could not have had a fair trial because of the mere existence of the confession and at the same time could not have had a fair determination on seeking to void it from the case" (A. 55). He described the situation as an "unfair pre-trial dilemma" (A. 55).

The claim that his attorney had misadvised him as to the nature of the charge to which he was pleading was also raised in the petition (A. 50). The alibi claim was not separately raised.

The Richardson Petition:

By petition verified July 2, 1965, Willie Richardson sought a writ of habeas corpus in the United States District Court for the Northern District of New York alleging that he was arrested on March 24, 1963 in New York County in connection with the homicide of two relatives; that he explained that he had changed from clothing which had become bloody from trying to stop a fight between the two; that he asked to see an attorney and was not permitted to do so; and that after "abuse threats and questioning I was finally coerced and forced to sign a confession against my will . . ." (A. 78).* The petition appeared to say that the guilty plea, entered some four months later, on July 22, 1965, was induced by the confession and it obliquely challenged the adequacy of counsel (A. 78-79). In a motion for reargument, Richardson sought to take advantage of the fact that the district judge had noted in his original opinion that his copy of the minutes of plea and sentence had not been formally certified by suggesting that there "may be a few pages lost" (A. 97) including an attempt by him to withdraw his plea, an assertion briefly alluded to in the original petition (A. 82) which also did not make it clear who had denied his application. Reargument was denied by the District Court (A. 98-100).

In his application to the Court of Appeals for the Second Circuit for a certificate of probable cause, Richardson

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* In his application for *coram nobis* Richardson alleged that he had made an involuntary confession and that his conviction "was based solely on this confession." The only factual allegations made were that he was arrested on a Sunday night and held until the following morning for arraignment.

alleged for the first time that his lawyer advised him that his plea would not preclude a later challenge to the voluntariness of the confession since a guilty plea would not be a waiver of his constitutional rights.

In a new affidavit, notarized on January 15, 1968 and annexed to his brief in the Circuit Court, Richardson claimed that the police confronted him with three people he had denied seeing earlier "because I did not wish to get them into any trouble" (A. 102); that his request to contact his attorney was denied; that the police told him that if he did not confess he would be convicted of first degree murder and electrocuted; that the police beat him and threatened him with electrocution for over an hour; and that he finally agreed to confess "to stop the beating" (A. 102-103). He continued that after he had been indicted, he was visited by an attorney who stayed with him for ten minutes, who took no notes and who told him that "he would get paid the same amount of money for representing me regardless of the outcome. He did not mention what he intended to do to help me or prepare my case" (A. 103). The next time Richardson saw his lawyer was for three or four minutes outside the courtroom on July 22, 1963. At that time the lawyer told him to plead guilty to second degree murder. Richardson said that he had not committed the crime and had confessed solely because of the beatings. The lawyer said that this was not the time to bring up the confession because if the confession was used at trial he would get the electric chair. He said the lawyer told him to save his life by pleading guilty to second degree murder and raise the confession issue later by way of habeas corpus. Richardson then entered the plea (A. 103-104).

Opinions Below

The District Court in *Ross** rejected the petition on the ground that "a plea of guilty constitutes a waiver of all non-jurisdictional defects in any prior stage of [the] proceedings against a defendant . . ." relying on *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018 (2d Cir. 1965), *People* v. *Nicholson*, 11 N. Y. 2d 1067, 184 N. E. 2d 190 (1962) and *People* v. *Dash*, 16 N. Y. 2d 493, 208 N. E. 2d 171 (1965) (A. 15-16).

The District Court in *Dash*** rejected the confession claim relying on *Glenn* and on *United States ex rel. Swanson* v. *Reincke*, 344 F. 2d 260 (2d Cir. 1965) and *United States ex rel. Boucher* v. *Reincke*, 341 F. 2d 977 (2d Cir. 1965). The Court rejected the claim that the trial judge threatened the defendant with the maximum sentence by referring to the acceptance by the state courts of an affidavit filed by the prosecutor that no such threat had been made, *People* v. *Dash*, *supra*, and by considering the transcript of plea revealing that Dash "made an intelligent and uncoerced choice and that no promises or threats were made to him" (A. 37-38).

In *Williams*, the District Court*** regarded as "ingenious" the claim based on *Jackson* v. *Denno*, 378 U. S. 368 (1964), that Williams "should not be deemed to have waived his right to challenge the confession, because, under the then existing procedure for determining the voluntariness of confessions, he could not have had a fair trial" (A. 71). The Court pointed out that the plea was entered

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* United States District Court for the Eastern District of New York (BRUCHHAUSEN, J.).

** United States District Court for the Southern District of New York (CANNELLA, J.).

*** United States District Court for the Southern District of New York (CROAKE, J.).

some eight years before the *Jackson* decision and that it was "most difficult, therefore, to accept the assertion that the right to go to trial was relinquished because he believed he would not receive a fair determination on the issue of voluntariness" (A. 72). The Court thus rejected the claim that Williams was entitled to challenge his confession because "A voluntary plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings." *United States ex rel. Glenn* v. *McMann, supra* at 1019 (A. 72). The Court also relied on *United States ex rel. Martin* v. *Fay*, 352 F. 2d 418 (2d Cir. 1965), for this proposition as well as for the proposition that the colloquy in open court at the time of plea with counsel present disposed of the claim that Williams believed he was pleading guilty to a misdemeanor. The Court also noted Williams' prior record in rejecting this claim (A. 72).

In the *Richardson* case, the District Court* relied heavily on the transcripts of plea and sentence (A. 88-95), stating that "it is difficult to understand from a reading thereof how any court could have taken additional safeguards to make certain that the plea was voluntarily and understandingly entered" (A. 85). Judge Brennan pointed out that the trial court ascertained that Richardson himself wished to plead guilty, that he had discussed the action with both his attorneys, that he had not been threatened, that no sentence promise had been made to him and that he had committed the murder to which he was offering the plea (A. 85-86). The district judge reiterated that "[i]t is impossible for this court to understand how the trial judge could have more conclusively established that the plea of guilty was both understandingly and voluntarily entered" pointing out that no attack was made on the plea at the time of sentence three months later and

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* United States District Court for the Northern District of New York (BRENNAN, J.).

that Richardson was now "apparently dissatisfied with the bargain" by which he was allowed to plead guilty to a reduced charge and to quash a second capital charge (A. 86). Having found the plea voluntary, and pointing to *United States ex rel. Martin* v. *Fay, supra*, the Court held that that plea waived prior non-jurisdictional defects relying on the *Glenn* case, *supra* (A. 86-87).

The Court of Appeals for the Second Circuit consolidated the *Ross* and *Dash* cases and considered them *in banc*. Subsequently, two separate panels reversed and remanded *Richardson* and *Williams* relying on *Ross* and *Dash*.

The majority opinion of the *in banc* Court, written by Judge Smith, viewed the *Ross* case as raising "the narrow question whether a District Court should apply the standards of *Townsend* v. *Sain*, 372 U. S. 293 (1963), in determining whether to hold an evidentiary hearing upon a habeas corpus petition where the petitioner is confined after a plea of guilty and is contending that the plea was not voluntary, because it was induced by the existence, or threatened use, of an allegedly coerced confession" (A. 114).

It proceeded to answer this question without ever specifically making the threshold inquiry required by *Townsend*, that is, whether the allegations of the habeas corpus petition would, if proved, entitle the petitioner to relief. 372 U. S. at 307. Indeed, it completely ignored the specific allegations in the instant petitions and dealt instead with the general nature of the allegations required to mandate a federal evidentiary hearing in such cases.

The majority accepted "the well-established doctrine that *if* the plea *is* voluntary, it is an absolute waiver of all non-jurisdictional defects in any prior stage of the proceedings against the defendant" but stated that that doctrine was being confused with the fact that an involuntary plea may be collaterally attacked (A. 115). The opinion reviewed

the genesis of the "confusion" between the two doctrines in its own prior decisions (A. 115-119) and held:

> "The rule should be stated as follows: Where a petition for habeas corpus raises a claim that a guilty plea was not voluntary, the standards of *Townsend* v. *Sain* are applicable in determining whether to hold a hearing; and although the waiver rule means that an allegation that the petitioner's constitutional rights were violated before the plea was taken is not, standing alone, sufficient to call the validity of the plea into question, nonetheless, if it is alleged that the plea was coerced in a manner spelled out in the petition, the alleged violations are not irrelevant to the issue of the voluntariness of the plea." (A. 119)

In assessing voluntariness; all of the factors going to "' the ultimate question of whether the defendant, at the time he pled guilty had the free will essential to a reasoned choice . . . .'" *United States* v. *Colson*, 230 F. Supp. 953, 955 (S.D.N.Y. 1964), must be taken into account including a coerced confession or an illegal search and seizure (A. 115).

Reading this rule in the context of the opinion, it appears that while "the mere existence of a coerced confession [is not] enough to invalidate a later guilty plea by a defendant represented by counsel" (A. 114), a guilty plea will be considered involuntary if it was "substantially motivated by a coerced confession" (A. 122, 125, 176).

In the language of the decision and in light of the petitions which it considered, only three allegations would appear to be required before the federal hearing is to be held. The first is that there was either a coerced confession or an illegal search and seizure; the second, that the prior illegality induced the plea; and the third that the plea was entered prior to the decision of this Court in *Jackson* v. *Denno*, 378 U. S. 368 (1964). However, any hope expressed

by the concurrence that the majority opinion is limited to pre-*Jackson* cases is undercut by the majority's inclusion of an illegal search and seizure as a factor to be taken into account in determining the voluntariness of a plea of guilty and by claimed consistency with cases in the Third, Fifth, Sixth, Seventh and Ninth Circuits, none of which discussed the *Jackson* issue (A. 120).

The majority did suggest that, in determining the voluntariness of the plea, "substantial weight" is also to be given to the fact that a defendant was represented by counsel with whom he consulted. However, it is unclear whether this consideration is to be taken into account before or after a hearing is ordered. In a short passage of the opinion replete with inconsistencies, it is stated that:

> "Even where there is evidence that a confession has been coerced, there may be factors which would justify counsel for the accused, once a fair hearing by the state court has been held on a motion to suppress the confession and suppression has been denied, to advise a plea of guilty. Therefore, a mere conclusory allegation by a prisoner without more, that the existence of a coerced confession induced his guilty plea, in the absence of any particularized allegations as to how that confession rendered his plea involuntary, should not ordinarily be considered sufficient to predicate an order for a hearing." (A. 120)

The opinion went on to state in a footnote, that ordinarily there should be additional supporting material, such as the affidavit of the attorney, or exhibits or affidavits of persons with knowledge of the facts appended to the petition in the District Court. In *Ross*, however, as in the other cases decided in light of *Ross*, no such material was deemed necessary and no reason was stated as to why the present allegations were sufficient without such further support. The above quoted passage also seems to require that a motion

to suppress be made and denied before counsel can even legitimately consider recommending a guilty plea. However, this was the situation in few, if any, pre-*Jackson* guilty pleas in New York and need not be the case even after *Jackson*.

The broad scope of the rule announced below is highlighted by its reliance on dictum in *Reed* v. *Henderson*, 385 F. 2d 995 (6th Cir. 1967), stating that the claim that a plea was involuntary because induced by coerced admissions is a well stated ground for habeas corpus relief (A. 120-121).

Failing to find any factual connection between the alleged coercion of the confession and the claimed involuntariness of the plea, the Court was forced to rely on the fact that the plea of guilty was entered before the decision of this Court in *Jackson* v. *Denno*, *supra*, relying on its own decision in *United States ex rel. Rogers* v. *Warden*, 381 F. 2d 209 (2d Cir. 1967), which states that:

> "There is nothing inherent in the nature of a plea of guilty which, *ipso facto*, renders it a waiver of defendant's constitutional claims. Rather, waiver is presumed because ordinarily such a plea is an indication by the defendant that he has deliberately failed or refused to raise his claim by available state procedures; therefore, principles of comity and the interests of orderly federal-state relations require that he should not be allowed to present these claims to the federal courts." (A. 121-122)

The majority found that the only available state procedure by which the validity of the confessions in these cases could be tested was the one declared "retroactively unconstitutional" in *Jackson* v. *Denno*. It viewed this as "even more damaging to an accused than lack of a right to appeal the intermediate order denying the Fourth

Amendment motion to suppress in *Rogers*" (A. 122).* Relying on the pre-*Jackson* procedure, the opinion held the respondents herein could not have been deemed to waive their confession claims "by deliberately by-passing state procedures when the state failed to afford a constitutionally acceptable means of presenting that claim" and could not be deemed to have entered voluntary guilty pleas if they were "substantially motivated by coerced confession[s], the validity of which [they were] unable for all practical purposes to contest" (A. 122, 125, 176).

In view of this reliance on *Jackson* v. *Denno*, it would seem that the issues to be resolved at a hearing are whether or not the confession was voluntary, and whether "the plea was freely made on advice of counsel because of the weight of the State's case aside from the confession, the apparent likelihood of conviction regardless of the confession, in a considered effort to obtain a lighter sentence" (A. 125).

In a separate concurring opinion, Circuit Judge Kaufman regarded the result reached by the majority as mandated by the decisions of this Court even though "the facts in the case under consideration may not be on all fours" with those decisions (A. 127), especially relying on *Machibroda* v. *United States*, 368 U. S. 487 (1962), and *Herman* v. *Claudy*, 350 U. S. 116 (1956). He suggested that where the prosecution had no evidence but an allegedly coerced confession and there was no adequate means of challenging the confession before trial, it would be "nothing less than fantasy" to say that the existence of the confession would not substantially motivate the plea. Acknowledging that "in the more common case" there is other evidence against the defendant, Judge Kaufman

* It should be pointed out that in *Rogers* it was not the lack of a right to appeal which conferred habeas corpus jurisdiction but the existence of such a right.

nevertheless felt that the courts were not released "from the obligation to consider the possibility that the existence of the confession had a substantial motivational effect" (A. 130).

Judge Kaufman regarded it as "a denigration of the rule of law, to recognize the infirmity of the pre-*Jackson v. Denno* procedure for challenging the legality of a confession in the case of prisoners who went to trial but to deny access to the judicial process to those who improperly pleaded guilty merely because the state would have more difficulty in affording a new trial to them" (A. 131). He rejected the suggestion that pleas entered after *Jackson v. Denno* would be affected by court's ruling and stated that it was the petitioner's burden to establish substantial motivation.

Chief Judge Lumbard, in a dissenting opinion, stated his conclusion that the guilty pleas of Ross and Dash were "entered knowingly and without coercion".

> "It is altogether clear that the defendants, after consulting with counsel, made an informed, deliberate and voluntary choice that their interests would be best served by pleading guilty to a lesser degree of the crime charged and by the likelihood that the sentence the judge would impose would be less than if they were to stand trial and be convicted" (A. 135).

He went on to state that the hearings which would be required by the retroactive application of *Jackson v. Denno*, would result "in profitless speculation and . . . an inquiry where no certain answers are possible" because of the virtual impossibility of reconstructing the prosecution's original case after the lapse of time (A. 135).

Judge Lumbard presented statistics which showed that about 95% of all convictions are based on pleas of guilty (A. 138-139). He pointed out that the system is advan-

tageous to all concerned and contended that if the decision to plead guilty could be placed in jeopardy many years later the State will have been deprived of a substantial part of the benefit of such a system. "Absent any fraud or overreaching existing at the time of the plea", neither the State nor the defendant should be able to reopen it (A. 138). He acknowledged that:

> "Were there any reason to suppose that injustice has resulted from the taking of pleas of guilty in New York courts in cases where prisoners, represented by counsel, had confessed, further inquiry would at least be justified. But no such suggestion has been made; no cases of injustice are cited and so far as I am advised there have been no such cases." (A. 139).

Judge Lumbard stated that he would confine *Jackson* v. *Denno*, to those cases in which New York had used a confession at trial over an objection that it was coerced on the theory that in the case of guilty pleas:

> "[T]he unconstitutionality of the pre-*Jackson* procedure is relevant only for its supposed impact in deterring defendants from going to trial and thereby inducing their pleas of guilty. This impact, which would be virtually impossible to determine since it requires reconstructing the defendant's state of mind, is unquestionably remote and speculative. It cannot be doubted that the existence of the pre-*Jackson* procedure has had a far more remote effect on the reliability of the process for determining guilt . . . in plea of guilty situations than it has had in cases which actually went to trial." (A. 140).

Moreover, he pointed out that a defendant was not precluded from going to trial before *Jackson* and that an attack on a confession was not futile since, even under that procedure, confessions were in fact held involuntary. Judge Lumbard then reviewed the petitions in light of these

jority holding and found that, even under those principles, Ross and Dash were not entitled to evidentiary hearings.

A dissenting opinion by Judge Moore questioned the applicability of the standards for holding habeas corpus hearings stated by this Court in *Townsend* v. *Sain*, 372 U. S. 293 (1963), to convictions based upon pleas of guilty. Judge Moore also stated that the majority had failed in its effort to state a rule which would aid the district courts in reviewing guilty pleas since it had purported to utilize motivation for pleading as the test and then proceeded to order a hearing in Ross where the facts were strongest for denying a hearing under that test (A. 150-155).

The dissenting opinion written by Judge Friendly was premised on his determination that:

> "No decision of the Supreme Court has held or even intimated that an accused who has been convicted upon a guilty plea, made on the advice of counsel after full explanation of its consequences and without coercion or trickery of any sort by the state, and thus 'voluntary' in the ordinary use of language, is entitled to have the conviction set aside because the plea was influenced in greater or less degree by a previous act of the state in violation of his constitutional rights." (A. 155).

He challenged the reliance of the majority on language from *Machibroda* v. *United States*, 368 U. S. 487, on the ground that that case involved an unkept promise regarding sentence and stated that a decision by this Court that Machibroda had alleged enough facts to require a hearing was not determinative of "the altogether different and highly important issue" raised in the instant cases. He challenged as well the majority's reliance upon *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116, as also involving the use of language as authority in total disregard of the context in which it was stated (A. 156-157).

Judge Friendly criticized the majority for failing to set forth "intelligible guidelines" for when a hearing should be held or how the district courts should rule on petitions after holding hearings:

> "'It is enough that the illegal confession was *a* factor, or must it have been an *important* factor? And how can anyone tell? Isn't a confession almost inevitably an important factor except when the other evidence is overwhelming? Even if the standard were framed a bit more rigidly so as to require a showing that the plea would not have been made 'but for' the confession, the trial courts are being given a job impossible of successful performance." (A. 158)

Judge Friendly sharply disputed the likelihood that the rule of these cases would be limited to pre-*Jackson* confession cases since he did not find persuasive the argument that the pre-*Jackson* procedure was, in fact, so unfair as to influence a decision to plead, especially in view of the availability of federal habeas corpus to test the confession. Finally he observed that "[i]t is high time to recall that, even with respect to criminal defendants, a bargain is a bargain if made by an intelligent man with full protection from the court and on the advice of counsel" (A. 161).

In *Richardson*, the Court ordered an evidentiary hearing after concluding that the extensive colloquy at the time of plea and sentence was "'not necessarily conclusive'" (A. 160) on the question of whether the plea was voluntary and because of Richardson's claim that the plea was the result of the threatened use of a coerced confession which he had wanted to challenge but which his attorney allegedly had told him could be tested at another time.

In *Williams*, the Court concluded that the *Ross* and *Bush* cases required that an evidentiary hearing be held where the petitioner alleged that the confession was the only

evidence against him, that he had an alibi which his lawyer had refused to present to the Court and that the pre-*Jackson* procedure denied him a fair opportunity to test his confession. In *Williams* there was the further claim that the petitioner did not know all the consequences of his plea because he said that his lawyer told him that he was pleading guilty to a misdemeanor not to a felony (A. 174-178). Judge Lumbard dissented in the *Williams* case. He pointed out that it seemed highly unlikely that there was no other evidence in the case in view of the fact that the rape-robbery victim could possibly have testified against him. He also pointed out that absolutely no particulars were given with respect to the asserted alibi claim and found the likelihood that he believed that he was pleading to a misdemeanor incredible. In any event he pointed out that record evidence might be available to refute these claims without a full scale evidentiary hearing (A. 178-180).

Summary of Argument

With a singularly broad and ill-considered stroke, the majority below has opened for plenary collateral review all pleas of guilty entered in state and federal courts in the Second Circuit apparently both before and since *Jackson* v. *Denno*, 378 U. S. 368 (1964). This extraordinary and undesirable result stems from a misconception of the components of a knowingly and voluntarily entered guilty plea, a disregard of the role of counsel in advising such a plea, an erroneous idea of the meaning of "waiver" in the context of a plea, an overextended application of the rule of *Jackson* v. *Denno*, *supra* and an unrealistic approach to the allegations required to sustain a petition for federal habeas corpus.

The opinion below reaches behind a guilty plea to test an evidentiary defense which could have been tested at a trial. Recognizing that a guilty plea has hitherto been held to foreclose such a test, the majority, in terms scarcely

less conclusory than the instant petitions themselves, has satisfied itself with holding that the challenged evidence may have "induced" the plea and that the prospect of going to a constitutionally guaranteed trial presented a "hazard" rendering the plea involuntary. Thus it held that, after a hearing determined that the belatedly challenged evidence would not have been admissible, the judgment of conviction would be vacated if the guilty plea was found to be "substantially motivated" by the "existence and threatened use" of such evidence. This assessment would in turn be made on an evaluation of the other evidence available and the bargain which the petitioner was able to strike for a reduced charge or sentence.

The new hearings, premised as they are on misapplications of law and ephemeral standards of proof, will not in the least advance the office of the writ of habeas corpus. Prior law is fully adequate to find and correct cases of unconscionable custody, of factually documented genuine overbearing of will. The facts alleged in these cases and shown by these records do not reveal such overbearing and these respondents are not entitled to *post-facto* hearing to assert their evidentiary claims.

The role of evidence, as such, has not been, nor should it be grounds for challenging the validity of a plea merely because it was taken into account by a defendant in his decision to plead. The fact that the evidence is now alleged to have been illegally obtained is irrelevant unless the petitioner for habeas corpus can show that the claimed illegality was coercive and, as such, persisted without effective interruption ultimately inducing the plea. In such cases the plea is involuntary not because the evidence would have been inadmissible but because the illegal conduct continued to the time of and coerced the plea.

Traditional notions of waiver serve to confuse rather than focus this inquiry except insofar as that term describes the legitimate *result* of a voluntary plea as op-

posed to the considerations weighed by the defendant prior to entering it. In this connection, counsel's function of insuring that a defendant is aware of his rights and acts freely after evaluating the alternatives available should not provide a crutch for otherwise insufficient allegations attacking the plea—especially when the advice given was obviously sound at the time.

These insufficient allegations are not buttressed by reliance on this Court's decision in *Jackson* v. *Denno, supra,* striking down New York's trial procedure for determining the voluntariness of a confession. Persons who pleaded guilty were not subject to this procedure and no construction of *Jackson* v. *Denno* can support a holding that the fact that the jury ruled on voluntariness inhibited the right to go to trial. At the very least, *Jackson* should not be retroactively applied to persons so tangentially affected by its ruling made in open court in the presence of and after consultation with counsel.

POINT I

The existence and possible use at trial of a confession now claimed to have been coerced does not render involuntary a plea of guilty, entered as an alternative to trial and after consultation with counsel. Accordingly, such a claim does not entitle a petitioner for federal habeas corpus to an evidentiary hearing.

The respondents in these cases stand convicted on their admissions of guilt. Each now seeks to test the voluntariness of a prior confession—an evidentiary claim which could have been tested at the trial he chose to forego. Apparently recognizing that no evidentiary claim, standing alone, is relevant to the plea, each makes the facile additional claim that his plea, too, was involuntary because it was induced by the prospect that his allegedly involuntary confession would be introduced against him at trial. In holding that such a claim entitles a petitioner to an

evidentiary hearing on federal habeas corpus, the majority below viewed its holding as consistent with at least five other circuits. However, the language in most of those cases goes far beyond their facts and even within those circuits the approaches to evidentiary claims are not consistent. Compare, *e.g.*, *Reed* v. *Henderson*, 385 F. 2d 995 (6th Cir. 1967) with *Humphries* v. *Green*, 397 F. 2d 67 (6th Cir. 1968); *Carpenter* v. *Wainwright*, 372 F. 2d 940 (5th Cir. 1967) with *Busby* v. *Holman*, 356 F. 2d 75 (5th Cir. 1966); and *Doran* v. *Wilson*, 369 F. 2d 505 (9th Cir. 1966) with *Thomas* v. *United States*, 290 F. 2d 696 (9th Cir. 1961). By contrast, the broad language of the opinion below is more limited than its application to the instant cases. These cases present no exceptional grounds for relief, yet they will be subjected to the fullest possible hearings. Clearly, except in the extraordinary case (*infra*, pp. 28-30), the claim of inducement adds nothing to the evidentiary claim itself and is not a predicate for relief.

A. The potential inadmissibility of evidence at a trial forms no part of the inquiry either initially or collaterally into the knowing and voluntary nature of a plea of guilty.

In order to satisfy the strictures of due process of law, a plea of guilty which forms the basis of a judgment of conviction must be entered knowingly and voluntarily. *Boykin* v. *Alabama*, 395 U. S. 238 (1969). A guilty plea is knowingly made when the defendant understands the meaning of the charge, what acts amount to being guilty of the charge and the consequences to him of the plea. *McCarthy* v. *United States*, 394 U. S. 459 (1969); *Kercheval* v. *United States*, 274 U. S. 220 (1927); *Edwards* v. *United States*, 256 F. 2d 707 (D.C. Cir. 1958), *cert. denied*, 358 U. S. 847. A plea is voluntary where it is not "induced by promises or threats which deprive it of the character of a voluntary act." *Machibroda* v. *United States*,

368 U. S. 487, 493 (1962). In *Machibroda*, a case concerning failure to comply with Rule 11 of the Federal Rules of Criminal Procedure, there was an allegation of an overt threat of a higher sentence if there was no guilty plea and of a warning not to relay the discussion between defendant and prosecutor to the defendant's lawyer. See also *Waley* v. *Johnston*, 316 U. S. 101 (1942) (threat by an FBI agent of incitement to hanging by publication of false statement); *Murphy* v. *Wainwright*, 372 F. 2d 942 (5th Cir. 1967) (14-year-old defendant interrogated by sheriff during recess in trial and allegedly threatened and told to plead guilty); *United States* v. *Tateo*, 214 F. Supp. 560 (S.D.N.Y. 1963) (overt undenied threat by judge of higher sentence); *cf. Fay* v. *Noia*, 372 U. S. 391 (1963).

The availability of evidence to the prosecution has never formed a part of the inquiry into either knowingness or voluntariness. While the majority below recited the *Machibroda* standard, it distorted its meaning by equating the "threatened" use of evidence with the direct coercion of the plea alleged in that case. See *Watts* v. *United States*, 278 F. 2d 247 (D. C. Cir. 1960).

Every defendant knows that if he goes to trial evidence will be introduced against him and that if he does not go to trial it will not. Since the entire rationale of a trial is to create a forum for the presentation of evidence so that its adequacy to establish guilt of the charges may be determined, the threatened use of evidence hardly amounts to a denial of due process of law. It is the unequivocal right of every defendant to have just that "threat" carried out. Indeed, the recent due process safeguards announced by this Court are directed toward the defendant who goes to trial and insure the fairness of that trial. *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Griffin* v. *California*, 380 U. S. 609 (1965); *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Bruton* v. *United States*, 391 U. S. 123 (1968).

Assuming that a defendant makes no allegations of prior misconduct, no one would argue that his decision to plead guilty was constitutionally defective because the prosecution had a strong case. The fact that some of the prosecution's evidence is alleged now to have been obtained illegally does not alter its role as an influence in the decision to plead, except insofar as it may be an inducement to proceed to trial to test the issue. For the influence exerted by this allegedly illegal evidence *is as evidence.* It is not the fact that a confession may have been coerced which provides the inducement to plead. Rather, the "threat" faced by the defendants in such cases is that the confession will be used in evidence and the "fear" is that this evidence will be persuasive. However, both of these forms of "coercion" are simply factors in evaluating the likelihood of success at a trial—a rational evaluation made with the assistance of counsel. *Kent* v. *United States*, 272 F. 2d 795, 798-99 (1st Cir. 1959).

Other factors influencing the decision of a defendant who pleads guilty are a genuine desire to acknowledge his guilt and accept the consequences or an assessment of the likelihood of conviction, often balanced against the opportunity to plead to a reduced charge or the possibility of a lesser sentence. The respondents in all of the instant cases pleaded guilty to substantially less serious crimes than those with which they were charged. Ross was charged with one and Richardson with two counts of first degree murder. Each pleaded to one count of second degree murder.* Dash satisfied an indictment for rob-

* It has never been claimed that the possibility of capital punishment is an independent basis for attacking these guilty pleas (see *United States* v. *Jackson*, 390 U. S. 570 [1968]) nor did the Court below consider such an issue. It joined the murder and non-murder cases without differentiating between any legal consequences of the various sentences. Thus the issue is not before this Court. In any event, such claim could now only possibly be raised by Richardson, but since he rejected a plea to "Murder in the first degree with life imprisonment" the claim would be without merit.

bery in the first degree with his plea to robbery in the second degree. Williams pleaded guilty to robbery in the second degree in satisfaction of an indictment charging five felonies including rape and robbery in the first degree. Moreover, it is clear from the record that both Dash and Richardson rejected pleas to higher charges than those to which they ultimately pleaded (A. 25-26; 106).

The defendant must be able to make the required rational appraisal of the available alternatives in an atmosphere of relative freedom from coercive influences. *United States* v. *Celsus*, 230 F. Supp. 953 (S.D.N.Y. 1964). This appraisal, including the role which evidence is likely to play at a trial, is to be sharply distinguished from those situations in which the atmosphere coercing a confession continues unbroken to the time of plea and infects the appraisal itself. *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116 (1956); *Gladden* v. *Holland*, 366 F. 2d 580 (9th Cir. 1966); *United States ex rel. Peyronnet* v. *Randle*, 221 F. Supp. 1003 (E. D. Pa. 1963). Cf. *United States ex rel. McCloud* v. *Randle*, 402 F. 2d 853 (3rd Cir. 1968). These cases make it clear that a habeas corpus petitioner who can show a continuation of coercive elements from the time of confession to the time of plea, has always been entitled to relief.

Although the opinion below purports to rely on *Herman*, it does not require coercion at the time of plea, accepts the barest allegation of coercion at the time of confession and certainly requires no continuum of coercion from confession to plea. As Judge Friendly aptly commented in dissenting below:

> "No cumulation of resounding adjectives can conceal the chasm separating *Herman* v. *Claudy* from the case before us. If any such facts had been presented here, there would have been no *in banc* and no dissents." (A. 157).

An analogy may be drawn between these cases and those dealing with the voluntariness of successive confessions. In *United States* v. *Bayer*, 331 U. S. 532, 541 (1947), this Court held that it "has never gone so far as to hold that making a confession under circumstances which preclude its use perpetually disables the confessor from making a usable one after those conditions have been removed." In *Bayer*, the second confession, which was made six months after the first and after proper warnings had been given, was held voluntary.

A viable standard fully protecting a defendant's right to be free from unconstitutional coercion was announced by this Court in *Clewis* v. *Texas*, 386 U. S. 707, 710 (1967), holding involuntary a later confession on the ground that "[i]t plainly cannot . . . be separated from the circumstances surrounding the two earlier confessions . . . [there] is no break in the stream of events . . . sufficient to insulate the statement from the effect of all that went before."

This was precisely the situation in *Harrods*, *Hodgson* and *Ferguson*. In *Harrods*, the petitioner, who was at no time represented by counsel, confessed after being held incommunicado for 72 hours during which five charges were made against him and his family. He ultimately pleaded guilty to more than thirty charges without being advised that in doing so he faced a maximum sentence of 350 years and after he was directed, without explanation, to sign and forget, what proved to be his guilty plea.

The petitioner in *Hodgson* confessed, pleaded guilty to a rape charge and received a 20 year sentence within a 12 hour period. He was never represented by counsel although it was acknowledged that he had asked for and been denied a lawyer during the questioning by the police.

In *Ferguson*, the petitioner, who was confined in a state industrial school, was taken into custody by the police

pursuant to a writ of habeas corpus. Despite a magistrate's order to the contrary, the police kept him in their custody until his sentence, a period of 77 days, during which time he made a series of confessions and pleaded guilty to several charges. There was no record of the guilty pleas not even of the number of charges to which he pleaded. Although by the time of plea his family had retained counsel, petitioner did not see counsel on the day of plea and was sentenced to 50 to 100 years. In finding coercion, the district court concluded that by virtue of the writ of habeas corpus, the petitioner and his counsel "had every right to believe that the police had the power and authority of the judge behind them." 224 F. Supp. at 1009.

Generally, however, a plea of guilty represents a break between any prior violation of rights and the judicial admission. The courtroom itself has a different atmosphere with procedural safeguards not present when a confession is given. It is made before a neutral judge (contrast *Escobedo, supra*), in the presence of counsel and represents an affirmative act by the defendant including a new confession of guilt.

For example, in the instant cases each respondent was represented by counsel, each pleaded after judicial inquiry, each withdrew a prior "not guilty" plea and in each case there was a significant lapse of time between the alleged coercion of the confession and the plea and between plea and sentence. Ross claimed that his confession was obtained in May, 1954, his plea was entered in February, 1955 and sentence was imposed on March 14, 1955 (A. 4 to 14). Dash claimed that his confession was given on February 25, 1959. His plea was entered on April 6, 1959 and sentence was passed on August 3, 1959 (A. 23). Williams alleged that he confessed on January 25, 1961 (A. 191). He pleaded guilty on March 16, 1961 and was sentenced on April 19, 1961 (A. 811). Richardson claimed that he confessed on March 24, 1963 (A. 781). His plea was

entered on July 22, 1963 (A. 88) and he was sentenced on October 9, 1963 (A. 93). Significantly, only Richardson claims that he ever sought to withdraw his plea and that claim was made only to take advantage of the fact that the minutes of plea and sentence before the district court, not reflecting such a motion, were not certified (A. 96-97).

B. A voluntary plea of guilty is an independent basis of conviction not dependent on evidence.

As this Court held in *Kercheval v. United States*, 274 U. S. 220, 223 (1927):

> "A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence."

No cases more clearly demonstrate the independent basis for conviction of a guilty plea than these. And if conviction did not directly infect the plea itself (*Herman v. Claudy, supra*; *Gladden v. Holland, supra*; *Pierpolis v. Randle, supra*), these convictions are valid.

A knowingly and voluntarily entered guilty plea is not only a conviction but it is also a waiver of the right to a trial and its concomitants including the privilege against self incrimination and the right to confront one's accusers. *Boykin v. Alabama*, 395 U. S. 238 (1969); *McCarthy v. United States*, 394 U. S. 459 (1969); *Kercheval v. United States*, *supra*; *cf. Johnson v. Zerbst*, 304 U. S. 458, 464 (1938).

In a conceptual confusion typical of the opinion below the majority accepted both the rule that "a voluntary plea of guilty . . . is a waiver of all non-jurisdictional defects" (*United States ex rel. Elena v. McMann*, *supra* at 1019), and the statement that "[T]here is nothing inherent in the

these petitioners that they believed that introduction of their confessions would be tantamount to conviction is an acknowledgment that this was good advice. The fact that one aspect of the law upon which the advice was premised subsequently changed (*Jackson* v. *Denno*, 378 U. S. 368 [1964] (*infra*, Point II), does not affect the integrity of the advice or the plea which followed (*Alexander* v. *United States*, 290 F. 2d 252 [5th Cir., 1961]; *United States* v. *Miss Smart Frocks, Inc.*, 279 F. Supp. 295 [S.D.N.Y. 1968]), especially where, as here, other considerations than just the available procedure undoubtedly entered into that advice.

Particularly inappropriate is the suggestion below that counsel's representation is not constitutionally adequate if he advises a guilty plea before all possible evidentiary hearings are held (A. 120), no matter how weak the claim or how strong the prosecution's case. Such a rule assumes away the competence of counsel to aid a defendant in evaluating the circumstances of his case. In addition, it elevates to a constitutional requirement N. Y. Code of Criminal Procedure §§ 813-c and -g providing for pretrial motions to suppress evidence. Even *Jackson* v. *Denno, supra*, did not hold that the forum for testing evidence must be made available before trial. Logically, moreover, the unique appeal provisions of those sections would also be constitutionally mandated.

As a practical matter, advising a defendant of the alternatives available is one of the important functions counsel performs at the pleading stage since "[i]t is apparent that the defendant needs to know the probability of being convicted should he stand trial". *American Bar Association Standards for Pleas of Guilty*, adopted February 1969, page 70. By accepting the self-serving allegations in the instant cases, however, the majority below has subverted this function of counsel. While acknowledging that counsel is necessary to insure the *knowing*

nature of the plea, the opinion simultaneously holds that if counsel performs this function he has provided his client with a basis for challenging the *voluntary* nature of the plea. Yet, logically, representation by counsel is either proper and insures the reliability of the conviction or it is inadequate and the conviction fails.

The crucial point is that this is primarily a counsel claim and only secondarily a plea claim and the failure of the Circuit Court to analyze it as a separate claim is a further reflection of the circular rule announced. If the counsel claim is substantial then it should be examined, but it should not resurrect the evidentiary claims even as a test of counsel's advice. *Busby* v. *Holman*, 356 F. 2d 75, 80 (5th Cir. 1966). Otherwise, the hearings held in the district courts will require exploration of the evidentiary allegations and a belated collateral assessment of whether or not counsel was in fact correct—an inquiry which bears no relation to the understanding nature of the plea or the voluntariness of the decision to plead and which is simply the evidentiary hearing on the purportedly waived claim.

Needless to say, the standards for determining the adequacy of representation should be no less stringent in the case of a guilty plea than in the case of conviction after trial. In both cases we may safely assume that the "convicted defendant is a dissatisfied client, and the very fact of his conviction will seem to him proof positive of his counsel's incompetence." *United States* v. *Garguilo*, *supra*, 324 F. 2d 797.

The allegations with respect to counsel in these cases fall far short of raising triable issues of fact. For example, Williams alleged that his attorney did not explain to him the difference between a felony and a misdemeanor and also knew that Williams had an alibi defense but refused to investigate it. Both allegations, raised for

the first time eight years after conviction are "palpably incredible." *Machibroda* v. *United States, supra* at 495. Williams had a long history of prior arrests and misdemeanor convictions. He did not allege that he did not know the difference between a felony and a misdemeanor, that he was surprised at his sentence or that he made any attempt to withdraw his plea. His alibi claim, made only in the brief annexed to the sworn petition, does not state a single evidentiary fact and would not support holding a hearing.

Richardson, in an affidavit submitted for the first time in the Circuit Court, alleged that his attorney merely conferred with him on one occasion for ten minutes and then again for three or four minutes on the day of the plea. He also alleged that counsel misadvised him as to his right to subsequently challenge his confession. Here, as in *Williams,* it is evident from the records as well as from the piecemeal presentation of these claims that they are mere afterthoughts. To begin with, Richardson's allegation that his attorney barely conferred with him is belied by the attorney's affidavit submitted to Supreme Court, New York County setting forth the services performed and requesting statutory compensation. He specifically refers to "conferences" with his client. Assuming that the conferences were as short as they are alleged to have been, it is nevertheless clear from the remainder of the affidavit that both assigned attorneys thoroughly examined the possibilities of going to trial. Moreover, "in spite of the shortness of the time, the appearance was not perfunctory. There is shown no lack of knowledge by counsel of either the facts or the law upon which counsel advised his client." *United States* v. *Wight, supra,* 176 F. 2d 378. This is borne out by the absence of any allegation that the briefness of the conference time precluded Richardson from relating to his attorneys the facts of the case and the facts of the coercion allegedly practiced on him. *Smith*

v. *Wainwright*, 373 F. 2d 506 (5th Cir. 1957), relied upon by the Circuit Court, is distinguishable. In that case the petitioner alleged that he was "*permitted* to confer with his court-appointed attorney for only 15 minutes" and that this one conference was held on the evening before trial—circumstances which may have effectively prevented counsel from adequately protecting his client.

Richardson's allegation that he was misadvised is unlikely, if not untrue, especially since it was made for the first time in the Court below.* Assuming, however, that the allegation is true, it is insufficient to require a hearing in view of the fact that counsel's advice in recommending the plea was plainly in Richardson's best interests. *Moore* v. *United States*, 249 F. 2d 504 (D. C. Cir. 1957).

Significantly, in none of the cases before this Court is there any substantial showing that counsel's advice to plead was incorrect or contrary to the defendant's best interest. Belated, conclusory allegations should not be a springboard for attacking counsel after he rendered "as effective service as could be rendered in the circumstances" of these cases. *Smith* v. *United States*, 304 F. 2d 403, 404 (D. C. Cir. 1962).

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* The history of Richardson's allegations suggests that he is not beyond fabrication in order to obtain relief. For example, after District Judge Brennan alluded to the fact that the minutes of plea and sentence submitted to him had not been officially certified, Richardson suggested that in the absence of certification a few pages might have been lost, which pages would show that he sought to withdraw his guilty plea—an otherwise wholly unsupported claim.

POINT II

The reliance below on *Jackson* v. *Denno*, 378 U. S. 368 (1964), to call into question all guilty pleas entered prior to the decision in that case where the existence of a coerced confession is alleged, is unfounded. In any event, *Jackson* v. *Denno* should not be retroactively applied to guilty plea cases.

In default of any factual allegations in the instant cases connecting the allegedly coerced confessions to the allegedly involuntary guilty pleas, the opinion below substituted a conclusion of law as the coercive element at the time of plea, to wit: the inability "for all practical purposes" to challenge the validity of the confession at trial because the procedure provided at the time of these pleas was declared "retroactively unconstitutional" in *Jackson* v. *Denno*, 378 U. S. 368 (1964). The effect is to presume the invalidity of all pleas entered before June 22, 1964 where it is alleged that a confession, which the petitioner believed to be coerced (contrast *Fay* v. *Noia*, *supra*), was obtained. *Jackson* v. *Denno* should have no such effect.

In *Jackson*, this Court overruled its own decision in *Stein* v. *New York*, 346 U. S. 156 (1953), because, under the procedure sanctioned in *Stein*, the possibility existed that the jury might hear a coerced confession and be unable to disregard it in making its determination on guilt or innocence.

However, it was not the threat of the *Stein* procedure itself but the possibility that the jury would hear a coerced confession which led to the *Jackson* result. If the confession in fact was voluntary, the use of the procedure was not error. This is conclusively demonstrated by the limited relief afforded in *Jackson* and by the subsequent

decision of this Court in *Pinto* v. *Pierce*, 389 U. S. 31 (1967).

Obviously, if it was the procedure itself which infected the trial, this Court in *Jackson*, would not simply have ordered rehearings on voluntariness but would have ordered new trials. In *Pinto* v. *Pierce*, *supra*, this Court upheld the validity of a trial at which the jury had heard the confession since the confession was voluntary and stated that it:

> "has never ruled that all voluntariness hearings must be held outside the presence of the jury, regardless of the circumstances."

Since the procedure itself did not invalidate all trials, its characterization by the majority below as posing a "hazard" unconstitutionally deterring the exercise of the right to trial is grossly inaccurate. In a directly analogous situation, this Court held that pre-*Griffin* v. *California*, 380 U.S. 609 (1965) procedures did not pose such a hazard to a defendant who testified before that decision, stating:

> "[C]omment on a defendant's failure to testify imposes an impermissible penalty on the exercise of the right to remain silent at trial. Yet it obviously does not follow that every defendant who ever testified at a pre-*Griffin* trial in a State where the prosecution could have commented upon his failure to do so is entitled to automatic release upon the theory that his testimony must be regarded as compelled." *United States* v. *Jackson*, 390 U. S. 570, 583, n. 25.*

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* The additional prophylactic benefit which might accrue to a defendant who wishes to testify but has a prior criminal record (*Jackson* v. *Denno*, *supra* at 389 n. 16) obviously is not the key to *Jackson* since it does not hold that such a person who did testify is entitled to a new trial.[3] Moreover it should be pointed out

(*footnote continued on following page*)

So little did the majority below question its erroneous conclusion that the pre-*Jackson* procedure created an all pervasive "hazard" of going to trial, that it did not even make the issue of the allegedly deterrent nature of the procedure one of the issues to be considered at the wholesale evidentiary hearings which it mandated. Yet if this is the coercion claimed to invalidate the plea, it must be alleged and proved. It cannot be assumed, as the opinion below did.

The fact is that when these respondents pleaded guilty there was a procedure available to New York defendants to test the voluntariness of confessions sought to be introduced against them. This procedure was, as Judge Friendly said below, "a long way from denying an accused a reasonable opportunity to have the validity of his confession determined" (A. 160). It was possible, of course, that the confession might never have been offered. See

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(*footnote continued from previous page*)

first, that the allegation is not made by any of these respondents, second, that such evidence would be just as damaging before a judge, who would then submit the confession to the jury, and third, that it might be possible to show involuntariness without the defendant testifying.

In this connection, the reliance by the majority below on *Harrison* v. *United States*, 392 U. S. 219, 223 (1968) dealing with the use at a subsequent trial of testimony presented at an earlier trial to rebut an inadmissible confession, is clearly misplaced. In that case, the prosecution sought to take advantage of a prior illegal act on its part. No such determination had been made in any of these cases when the decision to plead was made. Thus, *Harrison* was specifically limited by this Court to the "case in which the prosecution illegally introduced the defendant's confession in evidence against him at trial in its case-in-chief" 392 U. S. at 223, n. 9. The scope of the inquiry into the "why" of a plea of guilty is not expanded by *Harrison*. It still relates to knowingness and voluntariness as those terms have specifically been defined by other decisions of this Court. Finally, unlike the situation in *Harrison* the "whether" of the knowingness of a plea of guilty is as relevant as the "why."

People v *Donaldson*, 295 N. Y. 158, 65 N. E. 2d 757 (1946). It was also possible that it would be excluded before it went to the jury. See *United States ex rel. Fernanders* v. *Wallack*; 241 F. Supp. 51 (S.D.N.Y. 1965), *aff'd.* 359 F. 2d 267 (2d Cir. 1966), *cert. denied* 385 U. S. 880 (1966). Thus, even the "threatened use" is speculative and there certainly should be no presumption that the State would do an unconstitutional act. Moreover, as we have said, it would not be in every case, or even in most cases that the procedure would be unconstitutional, but only in those cases in which the confession was held to be coerced.

Even before *Jackson*, a defendant had the right to offer evidence and to have the Court rule preliminarily on his application to exclude his confession as involuntary (*People* v. *Alex*, 260 N. Y. 425, 183 N. E. 906 [1933]; *People* v. *Brasch*, 193 N. Y. 46, 85 N. E. 809 [1908]; *People* v. *Fox*, 121 N. Y. 449, 24 N. E. 923 [1890]; *People* v. *Tuomey*, 17 A. D. 2d 247, 234 N.Y.S. 2d 318 [2d Dept. 1962]; *People* v. *Nolan*, 2 A. D. 2d 144, 153 N.Y.S. 2d 905 [4th Dept. 1956]), albeit the hearing was held before the jury. *People* v. *Randazzio*, 194 N. Y. 147, 87 N. E. 112 (1909). Ironically, although the trial court could not hold a confession admissible as a matter of law (*People* v. *Pignataro*, 263 N. Y. 229, 188 N. E. 720 [1934]; *People* v. *Nunziato*, 233 N. Y. 394, 135 N. E. 827 [1922]), it could hold it inadmissible as a matter of law.

On appeal, neither the Appellate Division nor the Court of Appeals hesitated to order new trials where they found that a confession should have been excluded. See, *e.g.*, *People* v. *Donovan*, 13 N. Y. 2d 148, 193 N. E. 2d 628 (1963); *People* v. *Noble*, 9 N. Y. 2d 571, 175 N. E. 2d 451 (1961); *People* v. *Oakley*, 9 N. Y. 2d 656, 173 N. E. 2d 48 (1961); *People* v. *Leyra*, 302 N. Y. 353, 98 N. E. 2d 553 (1951); *People* v. *Valletutti*, 297 N. Y. 226, 78 N. E. 2d 485 (1948); *People* v. *Barbato*, 254 N. Y. 170, 172 N. E. 458 (1930); *People* v. *Weiner*, 248 N. Y. 118, 161 N. E.

441 (1928); *People* v. *Insetta*, 19 A. D. 2d 702, 241 N.Y.S. 2d 294 (1st Dept. 1963); *People* v. *Price*, 18 A. D. 2d 739, 235 N.Y.S. 2d 390 (3rd Dept. 1962); *People* v. *Ruocco*, 11 A. D. 2d 807, 205 N.Y.S. 2d 119 (2d Dept. 1960), *reargument denied* 14 A. D. 2d 700, 219 N.Y.S. 2d 789 (2d Dept. 1961); *People* v. *Catalfano*, 284 App. Div. 569, 132 N.Y.S. 2d 217 (3rd Dept. 1954); *People* v. *Cohen*, 243 App. Div. 245, 276 N.Y.S. 851 (2d Dept. 1935); *People* v. *Moyer*, 186 A. D. 278, 174 N.Y.S. 321 (2d Dept. 1919); *People* v. *Reilly*, 181 App. Div. 522, 169 N.Y.S. 119 (1st Dept.), affd. 224 N. Y. 90, 120 N. E. 113 (1918); *People* v. *Crossman*, 184 App. Div. 724, 172 N.Y.S. 567 (3rd Dept. 1918). State collateral attack might also be available. See *People* v. *Robertson*, 12 N. Y. 2d 355, 190 N. E. 2d 19 (1963).

While there might be some deference to the jury's supposed finding (see *e.g.*, *People* v. *Farrell*, 2 A. D. 2d 797, 153 N.Y.S. 2d 284 [3rd Dept. 1956]), each of these appellate courts could consider the question of coercion apart from the other evidence in the case.

Moreover, even where the appellate courts did not mandate outright exclusion of the confession, they did order new trials if all considerations relevant to the determination of voluntariness, such as delay in arraignment, had not been taken into account. See, *e.g.*, *People* v. *Elmore*, 277 N. Y. 397, 14 N. E. 2d 451 (1938); *People* v. *Aler*, 265 N. Y. 192, 192 N. E. 289 (1934); *People* v. *Kelly*, 264 App. Div. 14, 35 N.Y.S. 2d 55 (3rd Dept. 1942).* Plainly, the procedure provided for the discovery of valid claims of coercion and such claims have always been treated with scrupulous attention in the state courts.

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* Failing state remedies, resort could be had to the federal courts for habeas corpus relief. See, *e.g.*, *United States ex rel. Caminito* v. *Murphy*, 222 F. 2d 698 (2d Cir. 1955), *cert. denied* 350 U. S. 896; *United States ex rel. Wade* v. *Jackson*, 256 F. 2d 7 (2d Cir. 1958), *cert. denied* 357 U. S. 908; *United States ex rel. Corbo* v. *LaVallee*, 270 F. 2d 513 (2d Cir. 1959), *cert. denied* 361 U. S. 950 (1960).

Consequently, the possibility that the pre-*Jackson* procedure deterred trial is, as Judge Lumbard said below, "unquestionably remote and speculative" (A. 140). On the contrary, it was and is frequently in the defendant's best interest to go to trial and to cast any possible doubt on the voluntariness and hence on the truth of his confession. In fact, New York defendants, having had the pre-trial hearing mandated by *Jackson* v. *Denno*, *supra*, still go to trial and still demand that the issue of voluntariness be submitted to the jury and failure of the Court, when requested, to instruct the jury on voluntariness is reversible error, *People* v. *Vella*, 21 N. Y. 2d 249, 234 N. E. 2d 422 (1967); *People* v. *Prager*, 30 A. D. 2d 848, 293 N.Y.S. 2d 22 (2d Dept. 1968); *People* v. *Brown*, 24 A. D. 2d 740, 263 N.Y.S. 2d 449 (1st Dept. 1965).

A fortiori, it was and still is in a defendant's best interest, whatever the status of the confession and of the procedure for testing it, to go to trial in those cases where there was good reason to believe that the other evidence in the case aside from the confession was insufficient or did not corroborate the crime (New York Code of Criminal Procedure § 395). Indeed, a confession itself is not in New York sufficient basis to convict of a crime. There must be evidence which corroborates the fact that the act complained of was done and that it was done by criminal agency. A confession itself is not sufficient to establish the *corpus delicti*. See, *e.g.*, *People* v. *Reade*, 13 N. Y. 2d 42, 191 N. E. 2d 891 (1963); *People* v. *Cuozzo*, 292 N. Y. 85, 54 N. E. 2d 20 (1944); *People* v. *Fitzgerald*, 288 N. Y. 58, 41 N. E. 2d 457 (1942); *People* v. *Popoff*, 289 N. Y. 344, 45 N. E. 2d 904 (1942); *People* v. *Mummiani*, 258 N. Y. 394, 180 N. E. 94 (1932); *People* v. *Ulisano*, 18 A. D. 2d 432, 239 N.Y.S. 2d 983 (3rd Dept. 1963); *People* v. *Phelps*, 13 A. D. 2d 675, 213 N.Y.S. 2d 492 (2d Dept. 1961); *People* v. *Aparo*, 285 App. Div. 1171, 140 N.Y.S. 2d 542 (2d Dept. 1955); *People* v. *Eller*, 108 N.Y.S. 2d 105 (Mag. Ct. N.Y.C. 1951) (not officially reported).

The benefits and safeguards in the prior New York trial and appellate procedures make it unreasonable to assume that defendants were deterred from going to trial. This is conclusively demonstrated by the instant cases. Ross made no such allegation. In addition he was aware that there would be the testimony of a witness and the introduction of real evidence. Richardson made the opposite allegation. He contended that he wanted to test the confession but was misadvised as to the proper time for doing so. Apparently if he had known that it was the only available procedure, he would have been willing to go to trial to test the confession. Williams alleged that the existence of the procedure would have prevented him from having a fair trial but did not allege that he knew of the procedure. Indeed, in view of his allegations that he spoke with his attorney only briefly, that that attorney refused to raise an alibi defense and misadvised him as to the nature of the crime to which he would be pleading and in view of his own description of himself as a "20 year old indigent youth" (A. 49), it is unlikely that he could maintain any such contention. Williams, moreover, did not allege how he would have wished to present his alibi defense and it is at least a reasonable assumption that he would have had to testify in order present it. In that event, there would have been no reason not to test the confession. Dash similarly made a conclusory *post facto* contention that the procedure itself would have prevented him from having a fair trial. However, he too did not state that this was a factor in his deciding to plead guilty. Furthermore, it is significant that his co-defendants who did proceed to trial succeeded in having their conviction reversed precisely because of the introduction of their confessions obtained after indictment in the absence of counsel. *People* v. *Waterman*, 9 N. Y. 2d 561, 175 N. E. 2d 445 (1961). These co-defendants received the benefit of a newly announced rule in New York

which only subsequently was held by this Court to be required. *Massiah* v. *United States*, 377 U. S. 201 (1964).

The precise state of mind which induced a guilty plea cannot be determined, but as Chief Judge Lumbard said, the impact of the pre-*Jackson* procedure is certainly far more remote in guilty plea cases than in cases that went to trial. We must of necessity deal in probabilities. Weighing these, it is clear that the pre-*Jackson* procedure was not so inadequate as to compel the conclusion of law that defendants were prevented from going to trial by that procedure or that their guilty pleas were coerced by it.

Certainly the existence of the pre-*Jackson* procedure should not be read as automatically requiring evidentiary hearings or the retroactive application of *Jackson* to guilty plea cases. This conclusion has been reached by at least New York (*People* v. *Dash*, *supra*) and Pennsylvania (*Commonwealth* v. *Garrett*, 425 Pa. 594, 229 A. 2d 922 [1967]). Indeed, the issue is not strictly one of retroactivity, although the same considerations apply. There is a qualitative difference between holding a trial procedural right retroactive to persons directly injured by the tainted procedure or evidence and applying that same right to guilty plea cases where any injury is at most indirect.

Whether or not to apply a new rule retroactively is assessed by this Court in terms of the purpose to be served by the new rule, the extent of the reliance by law enforcement authorities on the old standards and the effect on the administration of justice of a retroactive application of the new rule. See, *e.g.*, *Jenkins* v. *Delaware*, 395 U. S. 213 (1969); *DeStefano* v. *Woods*, 392 U. S. 231 (1968); *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967); *Linkletter* v. *Walker*, 381 U. S. 618 (1965). *Jackson* v. *Denno* itself was held to be retroactive before this Court first fully considered the issue of retroactivity in *Linkletter* v. *Walker*,

supra. In the latter case it was said that *Jackson* was retroactive because its decision went to the integrity of the fact-finding process, that is to the reliability of the determination of guilt or innocence. Subsequent to *Linkletter* this Court gave only prospective effect to another case which also went to the integrity of the fact-finding process. *Tehan* v. *Shott,* 382 U. S. 406 (1965), holding *Griffin* v. *California,* 380 U. S. 609 (1965), not to be retroactive. In any event, whatever impact, the pre-*Jackson* rule had on the reliability of a jury verdict, it could not have such an impact where there has been a guilty plea and the fact-finding process is limited to the defendant's admission in open court that he is guilty of the crime to which he is pleading. Accordingly, protection of the fact-finding process is not at issue in these cases and to the extent that that is the purpose of the *Jackson* rule, it is not served by its retroactive application to guilty pleas.

Moreover, the reliance by law enforcement authorities on the *Stein* procedure can hardly be disputed. The procedure had been sanctioned by this Court and was the only procedure available to test an issue of fact. Indeed, it was believed by the courts that any other procedure would deny a defendant the right to have the jury assess the issue of fact. In this sense, *Jackson* represents a clearer case for non-retroactivity at least to guilty pleas than almost any other. Thus, *Mapp* v. *Ohio,* 367 U. S. 643 (1961), was held not to be retroactive despite the fact that the prosecution was on notice that the Fourth Amendment restriction against illegal searches and seizures applied to the states. *Wolf* v. *Colorado,* 338 U. S. 25 (1949). The standards of *Miranda* v. *Arizona,* 384 U. S. 436 (1966), are not retroactive (*Johnson* v. *New Jersey,* 384 U. S. 719 [1966]), even though the absence of counsel might legitimately be held to go to the reliability of the confession itself. Moreover, this long sanctioned procedure did not carry with it any of the possible suggestions of bad faith

inherent for example in *Bruton* v. *United States,* 391 U. S. 123 (1968), held retroactive in *Roberts* v. *Russell,* 392 U. S. 293 (1968), where a co-defendant's confessions were deliberately spread before the jury. By contrast, in cases affected by *Jackson,* the prosecution was simply seeking to introduce evidence which the defendant had a right to have tested but which the prosecution had a right to introduce if it was validly obtained. Accordingly, the reliance factor was great.

Finally, the effect on the administration of justice of a retroactive application of *Jackson* v. *Denno* to guilty pleas would be staggering. It would apply to all guilty pleas where it is alleged that there was a confession, whether oral or written, and would apply as well to underlying convictions which form the basis for multiple offender treatment in New York. The applications would be brought at the discretion of the petitioners at any time after the conviction. In the instant case, Ross waited ten years to seek state relief (A. 14), Dash waited four years (A. 23), Williams waited eight years (A. 47) and, although Richardson waited only eight months to seek relief (A. 84), he waited five years to seek relief on the ground ultimately reached by the court below (A. 104).

Not only did the prosecutor rely in these cases on the constitutionality of the procedure for testing confessions, but more important he relied on the guilty plea itself. By this reliance he accepted a reduced charge, often dismissing other indictments and may have abandoned his investigation which could possibly have turned up more evidence of guilt. Of course, he abandoned the chance to have a complete record preserving the testimony and evidence of guilt, particularly since in these cases there were no appeals and there were no motions to withdraw the pleas. Thus, trial after vacation of the guilty plea is a far more difficult matter than retrial after a conviction has been vacated following a first trial. See *Jenkins* v. *Delaware, supra.*

Moreover, the rationale of the court below would not be limited to confesion cases but would extend also to cases in which it was alleged, for example, that a co-defendant's confession would be introduced at the trial (*Bruton* v. *United States, supra*), or where there was so suggestive an identification procedure that the trial must inevitably have been tainted. *Stovall* v. *Denno, supra.* All of these factors militate against a retroactive application of *Jackson* v. *Denno* to guilty pleas.

POINT III

The new rule announced below was inappropriately announced for the first time on federal habeas corpus. Moreover, the opinion sets forth no adequate guidelines for the conduct of the hearings which it mandates.

If the opinion below was correct in its theory that an evidentiary claim may affect the acceptable nature of a plea of guilty, the relevance of such a consideration is solely a supervisory matter for the judiciary. It should be announced only on direct appeal and not on collateral review of a final state judgment of conviction.

However, not only did the majority below inappropriately announce its new rule in a habeas corpus case involving state prisoners, but in doing so it provided no guidelines to judges who must now decide whether or not to accept a defendant's offer to plead guilty. No attention was paid to the insuperable problem of protecting future judgments of conviction based on guilty pleas from subsequent attack based on a potential trial error.

This disregard by the majority below for the crucial role of the judicial procedure at the time of plea and sentence led it into two fundamental errors. The first is that it ignored the fact that even under the strict standards for taking guilty pleas provided by Rule 11 of the Federal Rules of Criminal Procedure, evidentiary considerations

are irrelevant, but this is certainly strong proof that they are not factors going to the voluntariness of the plea. The corollary to that error is that if the colloquy does not provide at least the initial answer to the question raised, collateral attack inevitably will range over a broader area than the inquiry at the time of conviction itself. The plea will merely be the prelude to collateral attack and plenary investigation of evidentiary claims. It is one thing to say that a finding of voluntariness at plea may not be overcome by outside proof going directly to that issue itself. *Machibroda* v. *United States, supra.* It is quite another to say that an issue which properly was not considered at the time of plea can be the basis for collateral invalidation of that plea. *United States* v. *Morin,* 265 F. 2d 241 (3rd Cir. 1959).

The result below thus sharply contrasts with the policy of this Court which has recently tightened the procedures for the federal courts' acceptance of pleas of guilty under Rule 11 and set constitutional standards for the state courts' acceptance of such pleas. *McCarthy* v. *United States,* 394 U. S. 459 (1969); *Boykin* v. *Alabama,* 395 U. S. 238 (1969). A purpose of these opinions is to set forth the factors which must be established before a plea is acceptable, yet no suggestion that potential evidentiary defenses might be such a factor is found. This omission cannot be oversight for the inquiries mandated by these cases were intended "to make a complete record at the time the plea is entered of the factors relevant to the voluntariness determination." *McCarthy* v. *United States, supra* at 465.*

Even the prerequisites to a knowing and voluntary plea listed in *Boykin* did not include whether the defendant was

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* In *McCarthy* there was some evidence that the defendant did not fully understand what facts would amount to guilt of the charges. In *Boykin,* the defendant pleaded guilty to five capital charges not involving the taking of life and the record was absolutely silent as to the knowing and voluntary nature of the plea.

aware of objections which he could make at trial to any evidence which might be offered. The inescapable conclusion is that the availability of evidence is not a factor relevant to the voluntariness of a plea.

Thus it is apparent that the decision below was a radical break with prior decisions relating to pleas of guilty. Even the Court of Appeals was aware of this when they considered the issue *in banc*. Yet no consideration was given to the difficult problem of announcing this new rule on habeas corpus. Both the inevitable retroactive application of a rule announced on habeas corpus and the nature of the remedy itself should preclude such an announcement.

Certainly, the new rule should not be retroactively applied. In the first place, as we have pointed out, prior law was fully adequate to cope with genuine issues of involuntariness (*supra*, pp. 28-30). See *Stovall* v. *Denno*, 388 U. S. 293 (1967); *Johnson* v. *New Jersey*, 384 U. S. 719 (1966). In the second place, the States must have the opportunity to establish colloquy procedures which could take account of the new factor and thus forestall the proliferation of the innumerable and inevitable collateral attacks. *McCarthy* v. *United States*, *supra* at 469, 472. It is to be noted that in *Boykin* v. *Alabama*, *supra*, this Court cited with approval the New York case setting standards for an adequate colloquy. *People* v. *Seaton*, 19 N. Y. 2d 404, 227 N. E. 2d 294 (1967).

Considerations for the finality of these judgments of conviction make the retroactive application of this new rule particularly inappropriate. *Halliday* v. *United States*, 394 U. S. 831 (1969).

As we have said in dealing with the more limited question of the retroactivity of *Jackson* v. *Denno* (pp. 47-49 *supra*), the procedure for determining the voluntariness of confessions did not relate to the reliability of the fact-finding process, that is to guilt or innocence. These pleas

were entered in reliance on the law as it stood at the time and the plea itself has been relied on by the State. The pleas by their very nature preclude retracing what might have happened at a trial especially in light of the fact that there were no appeals and no motions to withdraw the pleas. We cannot know with certainly whether the evidence would have been excluded, or the substantiality of the other evidence which might nevertheless have led to a guilty plea. To test these allegations it would indeed be necessary to have the trial itself.

As the Court so accurately stated in *Cantrell* v. *United States*, 413 F. 2d 629, 633 (8th Cir. 1969):

> "After self-conviction by a guilty plea, no judge can evaluate what the outcome would have been had the plea been otherwise, had a trial taken place, and had an evidentiary issue been raised and decided. A motion to suppress might or might not have been well founded. The evidence in question might or might not have been the difference between conviction and acquittal. It takes far more, we feel, than a mere assertion that a[n] . . . issue is present which might have been raised, and which, if raised might have been decided in petitioner's favor, and which, if so decided, might have resulted in an acquittal. These are the very kinds of considerations which enter into the decision, by the defendant and counsel, whether to plead guilty or not guilty. . . . One does not deserve both the choice of plea and the advantage of hindsight."

The impact on the administration of justice would be incalculable. If the rule below applies not only to confession cases which predated *Jackson* v. *Denno*, but, as it seems to, to all pleas of guilty where evidence would have been introduced at a trial, it would affect virtually 95% of State court judgments of conviction, at least those entered prior to the passage in New York of New York Code of Criminal Procedure §§ 813-c and -g. This result, prem-

ised on a hypothetical state of facts not heretofore considered even relevant to the voluntariness of a guilty plea is insupportable.

The decision below does serious disservice to the nature of habeas corpus itself. Habeas corpus is an extraordinary remedy designed to provide relief from unconscionable custody. *Fay* v. *Noia*, 372 U. S. 391 (1963). A man who is held by reason of an involuntary guilty plea is entitled to that relief and it has been made available to such persons before the decisions in the instant cases. The majority below, in ordering evidentiary hearings on the strength of these unremarkable petitions, has simply built a bigger haystack in which to look for needles far more readily apparent before that decision. It is no answer to say that the court "merely" mandated hearings. Such hearings are an enormous and unnecessary burden on courts, prosecutors and witnesses (if any are still available). Indeed, if the opinion were merely requiring more hearings but on traditional standards, the result might be supportable. But the flood of hearings which will inevitably follow an affirmance of the decision below would have a stifling effect on the flexibility of the remedy described in *Fay* v. *Noia*, *supra*. Volume itself tends to rigidify procedures especially when the volume consists almost entirely of nonmeritorious claims which will be made and disposed of as a matter of course, although after an undue expenditure of judicial resources. The writ was never designed to do this office and its vital function should not be sapped by the additional burden imposed below.

The burden is increased first because there is no clear holding below and second because the hearings the opinion appears to require would be impossible to conduct under the standards supplied, as the dissenting judges vigorously pointed out (A. 136-137, LUMBARD, Ch. J.; A. 151, MOORE, C. J.; A. 158-159, FRIENDLY, C. J.). The absence of any clear holding means that it is not clear whether the evi-

dentiary claim must be coupled with an inadequacy of counsel claim (*Richardson, Williams*) with a claim of threats (*Dash*) or promises (*Ross*) or stands alone as a substantially motivating factor. Thus, the issue before the hearing court is imprecise at the outset.

Second, there are no guidelines along which the hearing court is to proceed. For instance: Is the first question the voluntariness of a "confession"? Before this inquiry must there not first be a determination of whether any confession or admission was made? Must there not also be a determination of whether or not all or any of such confessions or admissions would have been introduced at trial? Even if the confession is voluntary, is that a total defense to the petition? Is the nature of the statement, whether a full confession or an admission intended to be exculpatory relevant? Under the reasoning of the Court should a man who makes a good faith claim of involuntariness be deprived of his right to challenge it solely because the challenge would fail? How is the Court below to determine the importance of the confession in inducing the plea? Is the Court to hold a mock trial to weigh the importance of the evidence itself? Is the Court to inquire into the weight actually given the confession by the individual defendant and his lawyer?

The next problem facing the hearing court is that the facts which underlie any and all of these questions are likely to be undiscoverable. Therefore, the hearing court will be faced with *pro forma* claims and jerry-built constructions of forgotten facts which had never been structured before. The absence of witnesses as well as the musty memories of those who still can be found will result in a permanent distortion of the relevant events. A conscientious court thus will be forced to rely principally on standards and burdens of proof and presumptions. Interestingly enough, no discussion of standards, burdens

and presumptions is offered by the Court below. There is already considerable confusion in the Second Circuit in this area relating to voluntariness of confessions in habeas corpus cases. See, *e.g.*, *United States ex rel. Cerullo* v. *Follette*, 393 F. 2d 879 (2d Cir. 1968), compared with *United States ex rel. Cerullo* v. *Follette*, 416 F. 2d 156 (2d Cir. 1969). It obviously would be intolerable for the State to bear the burden of proving the voluntariness of confessions which it never introduced at trial. Indeed the doctrine of presumption of regularity requires that in just the cases where the confession was coerced it should be presumed that the State would not introduce the tainted evidence.

Furthermore, these hearings would create a problem which has an analogue in other habeas corpus cases. It is well accepted that prisoners frequently make allegations under oath lightly and even perjuriously. Thus, when a decision such as that made in the instant case is rendered, hearings will automatically be ordered on the basis of *pro forma* allegations which may be totally false. Yet, no reasonable judge would grant a writ of habeas corpus solely on the basis of unsupported allegations on the part of the petitioner. Hearings should not be ordered where there is no chance of ultimate relief. At least if a case of such scope as the present one were to be confirmed, it ought to be done concomitantly with a strict requirement of substantial showing of merit. Some evidence (objective documents supporting witnesses, etc.) must support specific factual allegations by the petitioners before hearings should be ordered. While the Court below approved such a rule (A. 120), it did not follow it in any of these cases.

It should be remembered that the hearings accorded those who pleaded guilty under *Jackson* v. *Denno* are far more complicated than those afforded people who went to trial. The latter hearings involve only the question of voluntariness, the evidence concerning which usually was

on record and always had been unearthed at the time of trial. In the former cases, like those here, the evidence possibly was never known to the prosecuting attorney, let alone the judge. They frequently might not even know that there was a confession. Certainly, in most cases they would not have yet questioned the manner in which it was taken. The prosecution's weighing of the evidence in the case had not occurred. To recover such material after considerable passage of time (not less than six years in any case before this Court), is a mammoth task which ought not be shouldered by either federal or state judiciary unless the petition has a chance of success.

Thus, the effort by the Court below to limit the scope of its decision to "the narrow question whether a District Court should apply the standards of *Townsend* v. *Sain*, 372 U. S. 293 (1963), in determining whether to hold an evidentiary hearing upon a habeas corpus petition . . . ", actually expands the effect of its decision rather than limits it. For the Court never concludes what relief should be granted, but it does insure that a hearing must be held in every case in which an allegation is made that a defendant pleaded guilty before this Court's decision in *Jackson* v. *Denno*, *supra*, that he had made a confession and that that confession was coerced, even if no evidence whatsoever exists to support any of these allegations. However, if relief is not ultimately to be granted because of insufficient proof, it should not be intermediately granted to the extent of a hearing on that ground. That does not comply with, but rather violates, *Townsend* v. *Sain*, *supra*.

Where traditional claims of involuntariness and knowingness are adequately raised in a petition for habeas corpus, there is some reason to hold a hearing on those allegations. Otherwise there is not. The evidentiary claims raised by these respondents provide no basis for relief. The other allegations are either undocumented

(Dash's claim of a threat by the judge), conclusory (Williams' alibi defense), afterthoughts (Richardson's counsel claim, Williams' *Jackson* claim) or obvious fabrications (Richardson's claim that he sought to withdraw his plea). None mandate a hearing. If they did, the evidentiary claim would still be irrelevant. Since they do not, the evidentiary claim lends them no substance.

CONCLUSION

The decisions below should be reversed and the cases remanded with instructions to dismiss the petitions.

Dated: New York, New York, December 11, 1969.

Respectfully submitted,

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SUPREME COURT, U. S.

JAN 12 1970
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 153

DANIEL MCMANN, Warden of Clinton Prison, Dannemora, New York and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

vs.

WILLIE RICHARDSON, FOSTER DASH, and McKINLEY WILLIAMS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 153

DANIEL MCMANN, Warden of Clinton Prison, Dannemora, New York and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

vs.

WILLIE RICHARDSON, FOSTER DASH, and MCKINLEY WILLIAMS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Questions Presented

In all three cases,

Did the court below err in holding that the allegation, that a guilty plea is involuntary because it is based upon a coerced confession, stated a claim for relief under the Fourteenth Amendment entitling respondents to a hearing?

In Richardson,

1. Did the court below err in holding that the further allegation, that the respondent pleaded guilty instead of going to trial and raising the coerced con-

fession claim because court-assigned counsel was incompetent and misled him as to the effect of the plea as a waiver, alleged sufficient facts for a hearing on this claim?

2. Did the court below err in holding that the allegation that respondent was coerced into pleading guilty because court assigned counsel only conferred for ten minutes with him in a capital case, stated an independent claim for relief under the Fourteenth Amendment?

In Dash,

1. Did the court below err in holding that the further allegation that the respondent pleaded guilty instead of going to trial on the coerced confession claim because court assigned counsel, though competent, advised him that the only way of raising the claim at trial was one which was inherently unreliable and which did not avert the danger of a conviction even if the confession were found involuntary, alleged sufficient facts for a hearing on this claim?

2. Did the court below err in holding that the allegation that respondent was coerced into pleading guilty by the trial judge's threat to impose the maximum sentence if he went to trial, stated an independent claim for relief under the Fourteenth Amendment?

In Williams,

1. Did the court below err in holding that the further allegation that the respondent pleaded guilty instead of going to trial and raising the coerced confession claim because court assigned counsel refused

to investigate his case and because counsel also told him that the only way of raising the claim at trial was one which was inherently unreliable and which did not avert the danger of conviction even if the confession were found involuntary, alleged sufficient facts for a hearing on this claim?

2. Did the court below err in holding that the allegation that respondent was coerced into pleading guilty where assigned counsel failed to investigate an alibi defense and misled him by telling him he was pleading to a misdemeanor, stated an independent claim for relief under the Fourteenth Amendment?

Statement

Each case here for review was brought and decided separately below. Each case involves one common question of law (Point I, *infra*) but otherwise presents different questions of law for review although the petitioners have treated all three cases together. Accordingly, three separate statements of fact, as well as separate arguments for each case, are made.

1. Willie Richardson

Richardson was convicted on October 9, 1963, in Supreme Court, New York County, upon his plea of guilty of the crime of murder, second degree, and sentenced to a term of thirty years to life imprisonment. After indictment and through sentence, he was represented by two court assigned attorneys (A. 105). The minutes of plea show *inter alia* that Richardson admitted the homicide (A. 91) and stated that he was not threatened by anyone or promised anything in order to induce him to plead (A. 90).

Some eight months after sentence, Richardson moved *pro se* in the court of conviction to have his conviction vacated on the ground that his plea was induced by the fact he had been coerced into confessing his guilt (A. 84). Relief was denied without a hearing, and this ruling was affirmed on appeal[1] (A. 84).

A month after the highest state court denied leave to appeal, Richardson, still acting *pro se* filed the *habeas corpus* petition upon which, together with the supplemental affidavit (A. 101-104) filed later with the assistance of court assigned counsel, this litigation is based.

Richardson alleged that he was present during an altercation between two relatives but that he did not commit the homicides (A. 78, 101). On March 24, at 2:30 p.m. he was picked up by the police for questioning and taken to the station house (A. 78, 102). He was handcuffed (A. 102) and interrogated (A. 78, 102). Since he was on parole, he asked permission to contact an attorney he knew and whom he named, but the police refused (A. 78, 102). In his original petition, Richardson stated that "after incessive abuse, threats and questioning I was finally coerced and forced to sign a confession against my will, implicating myself in something I had nothing to do with . . . "(A. 78).

In the supplemental affidavit, he amplified this by stating that the police threatened him verbally and physically beat him on his face and stomach and other parts of his body, and that after more than an hour of threats and beatings, he agreed to confess (A. 102). Richardson stated he signed the confession in order to stop the beating (A. 103).

---

[1] Counsel was appointed for purposes of the Appellate Division appeal (A. 77).

On April 11, Richardson was indicted for first degree murder (A. 105) and a week later, Alfred Rosner, and a co-counsel, were assigned to represent him (A. 103).[2]

In his *pro se* petition, Richardson alleged that court assigned counsel and the District Attorney coerced him into pleading against his will and then denied him the right to withdraw the plea[3] (A. 82) and that counsel failed to make appropriate objections (A. 81, 82) and made no effort to protect Richardson's rights (A. 82). Richardson alleged that he was denied the effective assistance of counsel (A. 82).

In the supplemental affidavit, Richardson stated that Rosner came to see him for ten minutes before the date of the plea (A. 103). Rosner took no notes, and did not mention what he intended to do to help Richardson (A. 103). Rosner told him "he would get paid the same amount of money for representing me regardless of the outcome" (A. 103).

Richardson states he next saw Rosner on the day of the plea, and at that time the attorney told him to change his plea from not guilty to guilty of murder second degree (A. 103). Richardson protested, saying that he did not want to plead to a crime he didn't commit (A. 103-104). Richardson told the attorney that the confession had been beaten from him (A. 104). Rosner told him that "this was not the proper time to bring up the confession", because if

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[2] Prior to the assignment of counsel Richardson had been committed to Bellevue Hospital for psychiatric examination (A. 105) and apparently remained in Bellevue until June 20 (A. 106).

[3] Richardson also made an allegation that he told a judge he wanted to withdraw his plea, but the judge stated that since the court accepted the plea, this could not be done (A. 96).

he went to trial, the confession would be used to get him the electric chair, whereas if he pleaded guilty and saved his life, he could "later explain by a writ of habeas corpus how my confession had been beaten out of me" (A. 104).

Richardson then alleged (A. 104):

> "It was at this point that I decided to go along with the change of plea. I felt that if my own attorney told me that the confession would in all probability get me the electric chair; and also that I could attack the confession later without risking my life, then I had better go along."

The State of New York submitted no affidavit in opposition in the district court, and in the court of appeals submitted only the affidavit of Mr. Rosner executed September [*sic*] 9, 1963,[1] in support of his application to the court for compensation (N.Y. Code Crim. Proc. §308), in which Rosner stated in pertinent part (A. 106):

> "counsel had conferences with defendant and with each other relative to preparation for trial as well as relative to the advisability of obtaining and taking a compromise plea."

The Court of Appeals for the Second Circuit, in remanding the case for a hearing, held:

Since there had been no state court hearing on Richardson's allegations, he was entitled to a federal hearing unless his allegations were "vague, conclusory, or palpably incred-

[1] Rosner's affidavit is very confusing as to dates, reciting for instance, that sentence was imposed on September 25, 1963 (A. 107) whereas the minutes of sentence show that this was done on October 9, 1963 (A. 93).

ible" (A. 166) and the hearing could not be denied merely because the facts asserted by him are contradicted by the State (A. 167).

Since a "voluntary" plea of guilty waives all non-jurisdictional defects, "it is only logical that the standards for determining voluntariness must be as high as those for waiver" (A. 169).

Presence of counsel and the conversation between judge and prisoner at the time the plea is taken are not necessarily conclusive on the question of whether the plea was voluntary (A. 169).

> "In this case, the petitioner alleges that his guilty plea was the result of the threatened use of a coerced confession, that he did not want to plead guilty and wanted to assert his claim that the confession was coerced, but that the attorney inaccurately informed him that this was not the proper time to bring up the matter and that the claim should be presented at a later time . . . a hearing is clearly called for to ascertain whether the guilty plea was freely made, without infection from the confession and with 'effective assistance of counsel'" (A. 170).

2. Foster Dash

Dash was convicted upon his plea of guilty in the former County Court for Bronx County on August 3, 1959, and sentenced to eight to fifteen years as a second felony offender.

In January of 1959, "John Doe" indictments for robbery had been returned against three persons and warrants issued for their arrest (A. 23). Dash and two other persons,

Albert Devine and Rudolph Waterman were arrested. Confessions were obtained from Waterman and from Dash. Waterman and Devine went to trial and were convicted. Their convictions were reversed (12 A.D.2d 84 [1st Dept., 1960] aff'd 9 N.Y.2d 561 [1961]) on the ground that statement taken from Waterman violated his constitutional right to the effective assistance of counsel, the Appellate Division also noting that:

> "... the circumstances under which the alleged confession was obtained may well stamp it as involuntary when fuller evidence is adduced" (12 A.D.2d at 87).

In 1963, Dash brought a writ of error *coram nobis* in state court attacking the voluntariness of his plea. The writ was denied without a hearing, and the order affirmed on appeal by the Appellate Division (21 A.D.2d 978, 1st Dept., 1964) and the New York Court of Appeals, two judges dissenting. 16 N.Y.2d 493 (1965).

Dash then applied for the federal writ, alleging that he was arrested and held incommunicado for seven and one-half hours (A. 25), beaten and questioned in relays (A. 24) and refused the right to contact his family or to be confronted with witnesses against him (A. 25). When he was taken to an assistant district attorney he asked for counsel, but was told he had already been indicted and that he could have counsel soon enough (A. 55). He was further told that if he did not cooperate, the office would "clear the books" with him and fix it so that every unsolved crime would be his (A. 25). Dash alleged he then involuntarily signed a prefabricated confession to a crime he did not commit[5] (A. 25).

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[5] The District Attorney's brief to the New York Court of Appeals in *People* v. *Waterman*, *supra*, stated that the complainant testified

On March 16, after counsel was assigned, Dash appeared for pleading and was told that the District Attorney was offering a plea to robbery, first degree. "Defense counsel advised relator that he had better interpose a plea of guilty to the indictment due to the confession signed by this relator" (A. 25). Dash wanted to go to trial because he was not guilty of any crime (A. 26). The case was postponed until April 1, and when Dash appeared in court, the trial judge "stated that if relator decided to go to trial, and then did not prevail therein, the court would then impose the maximum penalty upon him" (A. 26).

Dash alleged that his counsel's statement that he "didn't stand a chance" due to the confession,[6] coupled with the trial judge's threat that he would receive the maximum sixty year sentence if he stood trial, induced his plea.

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at trial that he was robbed by *three* men, Devine, Waterman and Fields (Br. p. 2). The only other prosecution witness, a taxi driver, stated he drove four men away from the scene of the crime (Br. p. 3). He was unable to identify them (Br. p. 3). The complainant testified that *three* men pulled away from the scene in a taxi (Br. p. 2). The only other evidence at the trial was Waterman's confession, and a ring which the complainant stated Fields had taken from him during the robbery (Br. p. 3).

[6] In his legal argument, Dash stated (A. 29):

> "The futility of relator's position is more clearly seen when this Court considers the fact, that the only choice remaining to him—beside the entry of the plea of guilty to a crime that he had not committed—was to proceed to trial in the hope of challenging the admissibility of the alleged coerced confession. For it was only in the case of *Jackson v. Denno* (32 U.S.L.W. 4620 (1964), decided by the United States Supreme Court June 22, 1964), that the Court recognized the insoluble plight of a defendant in New York, faced with the decision whether to challenge the admissibility of a confession, had in violation of the United States Constitution. Relator had no such remedy when he was faced with the situation."

The State's affidavit in opposition did not deny the allegations of the writ, but asked that relief be denied on the ground that a voluntary plea of guilty entered on advice of counsel is a waiver of all nonjurisdictional defects. The affidavit also stated that it appeared from the New York Court of Appeals opinion that the state court prosecutor filed an affidavit in the *coram nobis* proceeding stating that the trial judge never threatened Dash. This affidavit was not produced below. The State also observed that even assuming the trial court did inform Dash as to the possibilities of sentence, "such advice is not only not improper but may even be desirable." (A. 34).

The Court of Appeals for the Second Circuit, *en banc*, reversed the denial of the writ without a hearing and remanded for a hearing, holding:[1]

> A plea of guilty, even where the defendant is represented by counsel, is not an absolute bar to collateral attacks upon a conviction (A. 114).
>
> The doctrine that an involuntary guilty plea may be collaterally attacked and the doctrine that a guilty plea waives prior defects in the proceedings against the defendant are separate and distinct (A. 116).
>
> Where a petitioner for *habeas corpus* raises a claim that a guilty plea was not voluntary, the standards of *Townsend* v. *Sain*, 372 U.S. 293 (1963) are applicable in determining whether to hold a hearing (A. 119).

[1] Since the decision in Dash's case was in large part predicated upon the decision in *U.S. ex rel. Ross* v. *McMann* which has been dismissed and vacated by this Court as moot due to Ross' death, 38 U.S.L.W. 3209, the summary of decision here is taken from that case, as well as the *Dash* opinion.

The guilty plea-waiver rule means that an allegation that petitioner's constitutional rights were violated before the plea was taken is not, standing alone, sufficient to call the validity of the plea into question (A. 119). However an allegation that a confession was coerced, and that the confession induced the plea, made with particularized specifications as to how the confession rendered the plea involuntary, is sufficient for a hearing, provided that additional supporting material, such as affidavits of counsel or the like, are appended to the petition (A. 120).

The role of the attorney in advising a guilty plea should not be ignored, even where there is evidence that a confession has been coerced (A. 120). The reason for this is that counsel's advice to plead guilty despite the existence of a coerced confession may be justified once a fair hearing by the state court has been held on a motion to suppress the confession and suppression has been denied (A. 120); but where the confession was coerced and where the only available state trial procedure for contesting the validity of the confession was one declared retroactively unconstitutional in *Jackson* v. *Denno*, 378 U.S. 368 (1964), the decision of the accused to plead guilty may well be involuntary, because a defendant cannot be deemed to have waived his coerced confession claim by deliberately by passing state procedures when the state failed to afford him a constitutionally acceptable means of presenting the claim at trial (A. 122).

In this case, Dash alleges coercion of his plea, relying partly on the existence and threatened use of his coerced confession and partly on an alleged threat by the judge to impose the maximum possible sentence if he were found

guilty after trial (A. 124). In these circumstances, there is a question of motivation of the plea which cannot be resolved without a hearing (A. 125).

If, at the hearing, it is ascertained that the plea was substantially motivated by the claimed threat of the judge or the existence and threatened use of a coerced confession, it may be found not to have been voluntary (A. 125). But if it is found that the plea was freely made on the advice of counsel because of the weight of the state's case aside from the coerced confession, with apparent likelihood of conviction regardless of the confession, the court may find the plea voluntary, and the conviction unassailable (A. 125). Of course, if it is found that the confession was voluntary and there was no threat by the trial judge, the conviction would stand (A. 125 n. 6).

3. McKinley Williams

Williams was convicted in the former Bronx County Court on April 9, 1956, upon his plea of guilty to the crime of robbery, second degree, and sentenced to seven and one half to fifteen years imprisonment.* He was represented by court assigned counsel (A. 48). The minutes of plea and sentence were not before either of the courts below.

Williams brought six applications for the writ of error *coram nobis* in state court attacking his plea and all were denied without a hearing (A. 177).

Williams applied *pro se* for the federal writ. In his petition, he incorporated the brief filed by assigned coun

* The opinion below incorrectly states that he was a second felony offender (A. 174). He had prior misdemeanor convictions, but no felony convictions.

sel on his last *coram nobis* appeal into the body of the petition (A. 48), although it was physically attached as an exhibit. Williams alleged that he was twenty years old when arrested on January 26, 1956, and that he was held at the Bronx police station without booking, on an open charge and not informed of his rights (A. 49-50). He stated that he was handcuffed to a chair, held without food or sleep, threatened physically, and that he finally agreed "to a tale narrated to him by police" out of fear and exhaustion (Appellate Division Brief, p. 3).

Williams was not assigned a lawyer until February 10 (A. 48). He alleged that the assistance rendered him by this attorney, who was later disbarred (A. 48 n. 4), was inadequate and incompetent (A. 60).

Williams stated that when he initially appeared in court, he refused to plead guilty (A. 50) but that following a conference with the lawyer, he returned to the courtroom and entered the plea (A. 50). Williams further alleged that he was not in the jurisdiction when the crime was committed, and that his attorney, despite knowing this, advised him to plead guilty on the representation he would be pleading to a misdemeanor (Appellate Division Brief, p. 4).[9] Williams stated that he was not apprised by the court either of the consequences of the plea, or of the nature and meaning of the charge (A. 50).

[9] The D.C.I. Report, which the Attorney General annexed to his reply, shows (as Williams pointed out (A. 69)) that at least one entry on the D.C.I. showed him in New York on a day when he was incarcerated in Dayton, Ohio (A. 65).

[10] Williams stated that he had attempted to secure an affidavit from the attorney in connection with a prior state writ, but was unable to locate him (A. 50 n. 6).

Williams also alleged that there were no witnesses who placed him at the scene of the crime, and that apart from the confession there was not "one scintilla" of evidence connecting him to the commission of the crime (A. 49). He argued that he did not waive his right to challenge the coerced confession by entering his guilty plea since at trial, he could not have received "a fair determination on the issue of voluntariness nor a fair trial" because at the time of his plea, the voluntariness of the confession was an issue of fact for the jury, to be resolved along with the issue of guilt or innocence, and "relator in effect by pleading guilty did not waive any genuine and valid right, since a waiver of an unfair procedure constitutes no waiver at all" (A. 54).

The State did file an affidavit in opposition to the petition in district court in this case. None of the factual allegations were controverted, as the State contended "that invalidity of the confession, even if shown, would not avoid the conviction upon petitioner's plea of guilty" (A. 61).

The court of appeals reversed the district court and remanded for a hearing on two grounds: while a voluntary guilty plea is a waiver of all non-jurisdictional defects, a prior constitutional violation of a defendant's rights is relevant to the issue of voluntariness of the plea itself. (A. 175) and since Williams alleged that his plea was motivated by a false, coerced confession, the validity of which he was unable, for all practical purposes, to contest at trial, he is entitled to a hearing on the voluntariness of his plea (A. 176-7); and, in addition, if Williams pleaded guilty on the advice of an attorney who knew of the existence of a perfectly good alibi defense, there is a question as to whether he was adequately represented by counsel when

he entered his plea (A. 177). Similarly if he was misled by the attorney into thinking he was pleading guilty to a misdemeanor, there is some question as to whether the plea was intelligently made. Hence Williams is entitled to a hearing to show that his plea was a mistake and was induced by inadequate representation of counsel (A. 177).

Summary of Argument

The court of appeals, in three separate cases, held that a petitioner is entitled to a *habeas corpus* hearing on the voluntariness of his plea where he alleges that his guilty plea was induced by the existence and threatened use of a coerced confession, which he could not contest at trial either because of incompetence of court-assigned counsel or because the existing trial procedure for litigating the confession claim was fundamentally unreliable and unfair and did not avert the clear danger of convicting the innocent.

In limiting its prior decision to the contrary[11] and adopting this rule, the Second Circuit brought its decisional law into harmony with the decisions of this Court (*Chambers v. Florida*, 309 U.S. 227 [1940]; *Waley v. Johnston*, 316 U.S. 101 [1942] and *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116 [1956]), as well as with the decisions of a majority of the other circuit courts of appeal and a substantial number of state court decisions,[12] which have

[11] *United States ex rel. Glenn v. McMann*, 349 F.2d 1018 (2d Cir. 1965), cert. den. 383 U.S. 915 (1966).

[12] Since these cases are so numerous, they have been cited in an appendix to this brief rather than set out in a footnote.

heretofore considered the effect of a coerced confession upon the voluntariness of a guilty plea. These cases interdict the use of a coerced confession to secure a plea because such a method of ascertaining guilt is neither reliable nor acceptable to a civilized society. Moreover, all of these cases hold that the entry of the plea is not an isolated and independent event divorced from all of the events occurring prior to the plea proceeding. These cases recognize that, despite the fact the defendant is represented by counsel and has stated that the plea is voluntary, a variety of things may have occurred prior to the plea which may have rendered the defendant incapable of making a deliberate and responsible choice. Because "the ascertainment of the guilt of a prisoner [is not] more important than the means by which it [has] been achieved",[13] these decisions are not content to rest upon a conclusive presumption of regularity in all plea cases, or to assume, as the petitioners would have them do, that "the potential inadmissibility of evidence at a trial forms no part of the inquiry either initially or collaterally into the knowing and voluntary nature of a plea of guilty" (Pet. Br. 25).

The Dash and Williams cases contain a factor not present in the cases previously referred to in that the court below recognized that before *Jackson* v. *Denno*, 378 U.S. 368 (1964), the existence of an unconstitutional and inherently unreliable proceeding for litigating the voluntariness issue at trial, could play a coercive role in the defendant's decision to abstain from raising his challenge to the confession at trial, just as other factors such as in

[13] *United States ex rel. Perpiglia* v. *Rundle*, 221 F. Supp. 1003, 1012 (E.D. Pa., 1963).

competence of counsel (as was alleged in *Richardson* and *Williams*) or lack of counsel altogether, could prevent the sentient waiver of trial from being a voluntary one in the constitutional sense. However, the notion that one who is forced to elect between submitting to an unconstitutional, or even unfair procedure, or to refrain from asserting his claimed constitutional right at all does not waive his right because he does not exercise a free choice, is consistent with prior law. See *Fay* v. *Noia*, 372 U.S. 391 (1963) and *Simmons* v. *United States*, 390 U.S. 377 (1968).

Ninety-five per cent of all criminal adjudications in this country are based upon pleas of guilty. The pleas in these cases were entered during an era when this Court was continually required to review case after case which came to trial with a confession extracted by brutality or psychological coercion. There is no reason to assume that within the perimeters of this "bigger haystack" of plea cases which petitioners posit (Pet. Br. 54), there are not defendants who were subject to the same abuses as were *Spano*[14] or *Leyra*,[15] or *Culombe*[16] or *Rogers*[17] and to conclude that because of the magnitude of the numbers, the Constitution need not be enforced for them as it has been for the few who have gone to trial.

In each of these cases the respondent has also alleged facts independent of the confession claim which would entitle him to relief under the Fourteenth Amendment if proved at a hearing. In ordering hearings upon these,

[14] *Spano* v. *New York*, 360 U.S. 315 (1959).

[15] *Leyra* v. *Denno*, 347 U.S. 556 (1954).

[16] *Culombe* v. *Connecticut*, 367 U.S. 568 (1960).

[17] *Rogers* v. *Richmond*, 365 U.S. 534 (1969).

claims as well as upon the coerced confession claims the decisions below were not as petitioners characterize them, "ill considered", "extraordinary" nor based upon "a misconception of the components of a knowingly and voluntarily entered guilty plea" (Pet. Br. 22).

POINT I

The Court Below Correctly Held That a Conviction on a Plea of Guilty Based on a Confession Extorted by Violence or Mental Coercion Is Invalid Under the Due Process Clause of the Fourteenth Amendment.

A guilty plea, in order to be constitutionally valid, must be voluntary, since the power of the court to pronounce judgment and sentence is predicated upon the plea rather than upon a jury verdict. *Kercheval* v. *United States*, 274 U.S. 220, 223-4 (1927).

There are three basic reasons why a plea must be voluntary:

First, since the Constitution guarantees all defendants a right to trial, the entry of a guilty plea constitutes a waiver of that right, as well as the right to confront one's accusers and the privilege against compulsory self-incrimination. *McCarthy* v. *United States*, 394 U.S. 459 (1969). As with all waivers, the plea must be intelligently and voluntarily made.

> "For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnston* v. *Zerbst*, 304 U.S. 458, 464 (1938). Consequently, if

a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." *McCarthy v. United States*, *supra*, 394 U.S. at 466.

Second, the requirement of voluntariness, emerging as it does from the concept of due process, requires, at a minimum, a fair fact finding procedure designed to elicit accurately the relevant facts. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). Conviction upon judicial admission of guilt satisfies this requirement unless the admission has been induced by unfair means [*Boykin v. Alabama*, 395 U.S. at 242-3], or means which might induce an innocent person to plead guilty. *Von Moltke v. Gillies*, 332 U.S. 708, 719 n. 5 (1948).

Thirdly, a compelled judicial admission of guilt conflicts with the defendant's Fifth Amendment right not to be compelled to incriminate himself. *Harrison v. United States*, 392 U.S. 219 (1968). In this respect, the requirement that a plea, like any other judicial admission of guilt, be voluntary, is based upon the same ethical considerations which prohibit the use of any coerced confession as "offensive to basic standards of justice . . . because declarations procured by torture are not premises from which a civilized forum will infer guilt . . . " [*Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944)], and also because "the methods used to extract them offend an underlying principle in the enforcement of our criminal law; that ours is an accusatorial and not an inquisitorial system . . . " *Rogers v. Richmond*, 365 U.S. 534, 541 (1961).[18]

[18] Cf. *Developments in the Law: Confessions*, 79 Harv. L. Rev. 935 at 1064 (1966): "Although the present constitutional standard

When a guilty plea is based upon a confession extorted by violence or mental coercion it offends against each of these principles.

If the motivation for the plea is a coerced confession, then the decision to forego trial is not the rational product of a free will which, unbeclouded by subverting factors, freely and intelligently refused to put life or liberty to the test of a trial. (Cf. *Von Moltke* v. *Gillies*, *supra*, 332 U.S. 708, 729 [Mr. Justice Frankfurter, concurring].).

If the confession was coerced, and the plea is based upon that confession, then just as where a trial verdict is based upon such confession, there is no assurance that the fact finding procedure leading to the judgment is reliable.

The right not to be compelled to incriminate oneself is, in itself, grounded upon traditional notions of unreliability of this form of fact-finding, as well as the concept that in an accusatorial system, the state and not the individual must supply the evidence of guilt. Since a plea, like a jury verdict, is conclusive, while an extrajudicial confession is not, it would set reason on its ear to prohibit the lesser but not the greater.

The petitioners have argued that a *voluntary* plea of guilty is an independent basis of conviction not dependent on evidence. We have no quarrel with this statement.

denies that a confession's truthfulness is relevant to its voluntariness, it does not reject the common law understanding that many confessions given 'involuntarily' may be inherently untruthworthy." It could also be said this same inherent distrust of the truthfulness of the involuntary confession is part and parcel of the constitutional standard interdicting the involuntary guilty plea.

However, their entire argument (Pet. Br. 31-35) is misplaced, since in making the "constitutionally required determination"[20] that a plea is voluntary, this Court has never taken the position urged by petitioner and relied upon by Judge Friendly in his dissenting opinion in *Ross*, and *Dash*,[21] that a coerced confession "forms no part of the inquiry, either initially or collaterally into the knowing and voluntary nature of a plea of guilty" (Br. 25).

Judge Friendly stated:

> "No decision of the Supreme Court has held or even intimated that an accused who has been convicted on a guilty plea . . . is entitled to have the conviction set aside because the plea was influenced in greater or less degree by a previous act of the state in violation of his constitutional rights" (A. 155).

In being so premised his dissent falls into the same basic misconception of the case law as that made by the petitioners.

In *Chambers et al. v. Florida*, *supra*, 309 U.S. 227, the convictions of four defendants were reversed by the Court on the ground that under the due process clause, they had the right to have their guilt or innocence determined without reliance upon coerced confessions. While one defendant went to trial, three were convicted upon their pleas of guilty[22] (309 U.S. at 227, n. 2).

In *Pennsylvania ex rel. Herman v. Claudy*, *supra*, 350 U.S. at 118, when the Court stated:

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[20] *McCarthy v. United States*, *supra*, 394 U.S. at 459.

[21] And adopted by the New York Court of Appeals in *People v. Nicholson*, 41 N.Y.2d 1067 (1962) and reaffirmed in *People v. Dash*, 16 N.Y.2d 493 (1965), see A. 146.

[22] Each defendant had counsel appointed to represent him on May 22, 1933 (Record, *Chambers v. Florida*, Respondent's brief

"Our prior decisions have established that (1) a conviction following trial or on a plea of guilty based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause . . ."

It cited *Chambers* as authority for that proposition. Hence it cannot be said, as Judge Friendly stated (A. 136), that "none of the six decisions cited by the Court in *Herman v. Claudy*[1] in support of that statement related to guilty pleas." And in *Waley v. Johnston*, *supra*, 316 U.S. 101, 104 the Court in holding that convictions upon a plea of guilty allegedly coerced by threats of law enforcement officials violated due process, reasoned by analogy that a conviction predicated upon such a plea is no more consistent with due process than a conviction supported by a coerced confession, citing *Chambers*. In both instances, since the plea is so coerced as to deprive it of validity to support the conviction, it is "likewise deprived . . . of validity as a waiver of his right to assail the conviction." 316 U.S. at 104.

The Second Circuit in its *Ellis* decision, *supra* (349 F.2d 1018), the district courts within the second circuit (A. 124), and the New York Court of Appeals had held that "a coerced confession or other violation of the defendant's rights is *never* relevant to the issue of voluntariness" of the plea (A. 312). A majority of the judges in the decision below (as have a majority of the other circuits)[2], relied upon the Court's statements in *Herman*

p. 2) and pleaded on May 24, 1933 (Record *Chambers v. Florida*, Petitioner's brief p. 20). Williams and Woodward pleaded guilty on May 24 and Davis and Chambers pleaded not guilty. Davis later withdrew the not guilty plea and pleaded guilty. (309 U.S. at 235).

[1] See p. 21 n. 20, *supra*.

[2] See Appendix to this brief.

v. *Chaudoin*, *supra*, and *Henry v. Johnston*, *supra*, to hold that a coerced confession is relevant to the voluntariness of a plea. Based upon its interpretation of these cases, the court below stated the following rule:

> "... an allegation that the petitioner's constitutional rights were violated before the plea was taken is not, standing alone, sufficient to call the validity of the plea into question, nonetheless if it is alleged that the plea was coerced in a manner spelled out in the petition, the alleged violations are not irrelevant to the issue of the voluntariness of the plea. An alleged violation of constitutional rights is simply another factor to be taken into account in determining the voluntariness of the plea". (A. 119).

The opinion below does not "reach behind a guilty plea to test an evidentiary defense which could have been tested at trial". (Pet. Br. 22). It simply recognizes, as have virtually all courts considering the issue, that the guilty plea cannot be used, *ipso facto*, to insulate the State from its own illegal acts prior to the plea which brought about that plea. See concurring opinion below of Kaufman, J. (A. 130). Since petitioners concede that the claim that a prosecutor's threat occurring before the plea and coercing the defendant into pleading is open to judicial scrutiny (Pet. Br. 26), there is no logic in withholding judicial scrutiny, as a matter of law, in the case where the plea was coerced by the threatened use of a coerced confession at trial.

The petitioners construe the following [illegible] to sustain their argument in this respect: the threatened use of *legal* evidence hardly amounts to a denial of due process. Therefore, *a fortiori*, the fact that some of this evidence is now alleged to have been obtained *illegally* cannot

This simply does not follow. To the extent that an illegally obtained confession has been used to secure a conviction, the conviction violates due process. If the evidence is used to obtain the conviction by its introduction into evidence to secure a jury verdict, the verdict and hence the conviction is tainted with the underlying illegality. If the evidence is used to obtain the conviction by using it to secure a plea, the plea and hence the conviction is equally tainted. See *Chambers v. Florida, supra.*

Whether or not the illegally obtained confession was used to secure the plea, or whether the respondents pleaded for other reasons as petitioners suggest (Pet. Br. 27), must be decided at a hearing where a defendant alleges the former and the State maintains the motivation for the plea was the latter. The petitioners concede this when they recognize and do not dispute as wrongly decided, the cases which "make it clear that a *habeas corpus* petitioner who can show a continuation of coercive elements from the time of confession to the time of plea, has always been entitled to relief" (Pet. Br. 28). Our position (see Point II), and the court below so held, is that such a nexus between the coerced confession and the guilty plea was alleged to have existed in each of these three cases, and that the petitioners' attempts at distinguishing them from the cases where they concede that a hearing was properly granted are not persuasive.

The petitioners also state that the "role of counsel in advising a guilty plea should not be ignored" (Pet. Br. 35). Again we have no quarrel with this statement and neither did the court below (A. 120). However, we do take issue with petitioners' position that the fact each respondent was represented by counsel establishes, as a matter of law, that counsel was adequate (in the case of Richardson and

Williams) or that representation by counsel, when adequate, could insure that the coercive elements which produced the confession did not also produce the plea (see Point II).

POINT II

In Each Case Here for Review, the Respondent Has Made Sufficient Allegations, Which if Proved at a Hearing, Would Establish That His Guilty Plea Was "Based on" a Coerced Confession. Hence the Court Below Did Not Err in Granting a Hearing Upon This Claim in Each Case.

Having decided that a guilty plea is not insulated from judicial scrutiny when a *habeas* petitioner alleges the plea was predicated upon a coerced confession, the Second Circuit then went on to consider the subsidiary questions of (1) when does the law deem a plea to be *based on* a coerced confession and (2) what allegations must a petitioner in *habeas corpus* make in such a case in order to qualify for a hearing under *Townsend* v. *Sain, supra.*

A majority of the judges in the Second Circuit rejected the position now taken by the petitioner (Pet. Br. 28-31) and espoused by Judge Friendly in his dissent in *Ross* and *Dash* (A. 156-57) that if a conviction can ever be deemed "based on" a coerced confession it can only be so in the exceptional cases where the defendant was not represented by counsel at the plea and was coerced or tricked by the State "in the ordinary use of language" (A. 155).

In each of the three cases here for review, the Second Circuit held that "representation by counsel and proper

questioning by the judge at the plea taking [cannot be relied upon] to establish voluntariness . . . where the allegations of the habeas corpus petition raise questions which cannot be answered by reference to the transcript alone" (A. 121, opinion in *Ross-Dash;* A. 169, opinion in *Richardson*).

Once again, this is no innovation in the law. In *Machibroda* v. *United States,* 368 U.S. 487 (1962), the Court refused to assume the plea was voluntary in the face of allegations to the contrary, although the defendant was represented by counsel and the trial court had conducted a proper inquiry before accepting the plea.

See also *Pennsylvania ex rel. Herman* v. *Claudy, supra,* 350 U.S. at 121; *Walker* v. *Johnston,* 312 U.S. 286 (1941); *United States* v. *Tateo,* 214 F. Supp. 560, 564 n. 8 (S.D.N.Y. 1963).

Having decided that the plea proceedings themselves do not, *ipso facto,* foreclose further inquiry when the defendant is represented by counsel and makes an admission of guilt and voluntariness, the court below considered in each case whether the allegations of the petition, if proved at a hearing, would establish that a nexus existed between the allegedly coerced confession[24] and the plea,

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[24] The court below made it clear that the conviction would stand if the confession were ruled voluntary (A. 122 n. 4, A. 125 n. 6, A. 178). Therefore the suggestion in the *amicus* brief (p. 10) submitted by the District Attorney of New York County that the writ could be granted if the defendant merely subjectively believed the confession was coerced, is absurd. The question is whether the state violated the defendant's constitutional rights, not the defendant's subjective state of mind. See *Townes* v. *Peyton,* 404 F.2d 456 (4th Cir., 1968) cert. den. 395 U.S. 924 (1968), where the court held that the defendant's subjective fear of an unproven pattern of official behavior is insufficient to void a plea, even though if the pattern were proved, the plea would be invalid.

which would prevent the plea from being deemed voluntary.

1. Richardson

Richardson alleged that he was beaten into confessing a crime he did not commit. According to his petition, court-assigned counsel conferred with him only ten minutes and told him at that interview counsel would "get paid the same amount of money for representing me regardless of the outcome" (A. 103). On the eve of the trial, counsel advised him to plead guilty to murder, second degree, and when Richardson stated he did not want to plead to something he had not done and to which he confessed only because he was afraid and in pain, counsel told him "this was not the proper time to bring up the confessions" (A. 103-4). Counsel told him to plead guilty, thereby saving his life, and then he could later explain on a writ how the confession had been beaten out of him (A. 105).

The existence of the pre-*Jackson* v. *Denno* procedure for contesting the confession at trial played no role in the decision to plead,[25] and the court below, quite properly, did not rely upon this as an ingredient of its decision. It looked instead to the allegation concerning adequacy of counsel's representation generally and to the specific allegation of counsel's incorrect advice *vis a vis* the remedy for challenging the confession to supply the nexus between the coerced confession and the voluntariness or involuntariness of the plea.

During the entire period between the interrogation at the station house and the plea, Richardson's attorney pro-

[25] And the petitioner so concedes (Pet. Br. 46).

vided the only buffer between the fact of the coerced confession and conviction for a capital crime. Without counsel's assistance, the confession could not be challenged, and without challenge to the confession, conviction was inevitable. There were no eye witnesses to the crime. The circumstantial evidence plus the confession meant death.

Richardson's case is not unlike two others, where the defendant, after making a coerced confession, was rendered powerless to prevent its being used against him because his attorney gave him only perfunctory assistance and where the writ was granted. *Jones* v. *Cunningham,* 297 F.2d 851 (4th Cir., 1962); *United States ex rel. Heath* v. *Rundle,* 298 F. Supp. 1207 (E.D. Pa., 1969). And in *Carpenter* v. *Wainwright,* 372 F.2d 940 (5th Cir., 1967), *Smith* v. *Wainwright,* 373 F.2d 506 (5th Cir., 1967) and *Bell* v. *Alabama,* 367 F.2d 243 (5th Cir., 1966), hearings were ordered on similar allegations to those made by Richardson.

These cases recognize that without the effective assistance of counsel, a defendant, faced with the alternatives of trial or plea, does not have a fair choice between viable alternatives, since the option of going to trial with ineffective assistance of counsel is not a legitimate one. Cf. *Wilson* v. *Rose,* 366 F.2d 611 (9th Cir., 1966); *United States* v. *Colson,* 230 F. Supp. 953 at 961 (S.D.N.Y., 1964). Furthermore, they also recognize that without the effective assistance of counsel, just as with no counsel at all, the coercion producing the confession continues unbroken until the entry of the plea, since no neutral agent is interposed between the initial coercion and the plea itself. Cf. *Gladden* v. *Holland,* 366 F.2d 580 at 583 (9th Cir., 1966). In this respect these decisions are akin to the cases involving successive confessions, where the second "valid" confession

cannot be separated from an earlier involuntary one. No matter how respectable the second confession may appear on the surface it is tainted if there is no break in the stream of events sufficient to insulate that confession from the effect of all that went before. See *Clewis* v. *Texas*, 386 U.S. 707, 710 (1967).

The allegation that, in addition to giving him perfunctory representation, the attorney misled him as to when the confession issue could be raised, presents a second basis for holding that the plea was not voluntary and hence not a waiver of his coerced confession claim: if Richardson gave up his right to trial upon the assumption that by doing so he did not waive the right to contest the voluntariness of his confession at a later date, then he did so without knowledge and understanding of the "nature and consequences" of the guilty plea he entered.[26] A plea given without knowledge of its nature and consequences is not a voluntary plea (*McCarthy* v. *United States, supra*, 394 U.S. 459) because for any waiver to be valid, it must be made with awareness of the rights that it abandons.[27]

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[26] *People* v. *Nicholson, supra*, 11 N.Y.2d 1067, holding that confession claims could not be raised after a plea of guilty, was decided the year before Richardson's plea.

[27] This is not, as the petitioners seek to make it appear (Pet. Br. 33-35) a claim that the guilty-pleading defendant must be aware of the *result* of the motion to exclude the confession before he can enter a knowing and intelligent plea, but merely that he must be informed by someone, either the court or counsel, that if he pleads he loses his right to contest the confession forever. *Cantrell* v. *United States*, 413 F.2d 629 (8th Cir., 1969), relied upon by petitioners for their overgenerous statement is inapposite because in that case, although the defendant alleged he was unaware that his plea waived his Fourth Amendment claim, the district court specifically found that "all of the petitioners rights were

There are many situations in which a plea has been vacated as involuntary because the defendant did not understand the nature or consequences of the plea. Generally speaking, these are cases where the defendant was unaware he was pleading to a felony [see *Anders* v. *Turner*, 379 F.2d 46 (4th Cir., 1967)] or was unaware of the penalty involved [see *Pilkington* v. *United States*, 315 F.2d 204 (4th Cir., 1963)]. In these cases, as in the case at bar, since the defendants lacked accurate knowledge of the nature or material consequences of the plea, the pleas were ruled involuntary.

Richardson made specific allegations as to why his plea was "based on" the allegedly coerced confession.[28] Without the effective assistance of counsel, he could not have challenged the confession at trial and he had no choice but to plead guilty. He was on trial for a capital crime. Any other course might well have "seemed an act of defiance, likely to offend the Judge as an arbitrary impediment to a swift sentence where guilt had already been

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fully explained to him not only by the court but by the District Attorney and he fully understood them." 413 F.2d at 631.

People v. *Habel*, 25 A.D.2d 182 (1st Dept., 1966) and 18 N.Y.2d 148 (1966) is more analogous to the case at bar than the *Cantrell* decision. There the defendant entered his plea upon the misconception, uncorrected by either the court or the prosecutor, that despite the plea he could raise the denial of a motion to suppress evidence based on eavesdropping orders on appeal. Both the New York Appellate Division and Court of Appeals ruled that he could not and dismissed his appeal, but both courts accepted the District Attorney's concession that, because of the misconception of the nature and consequences of the plea in this respect, the plea could be withdrawn if the defendant was so disposed.

[28] As we show (Point III, *infra*) these allegations were not patently absurd or contradicted by the record as a whole.

acknowledged." *United States ex rel. Perpiglia* v. *Rundle*, *supra*, 221 F. Supp. at 1011-12. The court below did not err in holding that "a hearing is clearly called for to ascertain whether the guilty plea was freely made, without infection from the confession and with 'effective assistance of counsel'" (A. 170).

2. Dash

Dash alleged that he was arrested after an indictment had been returned against him, and that he was held incommunicado for seven and one-half hours, refused the right to contact family, questioned in relays, and beaten. He was told that if he did not confess, the district attorney's office would "clear the books" with him, and further told that he could not have counsel present at that time. He then signed a "prefabricated" confession to a crime he did not commit.

Counsel was assigned and soon after conveyed an offer from the District Attorney's office for a plea to robbery first degree. In urging him to take the plea, counsel told him that he didn't stand a chance at trial because of the confession. Dash remained unconvinced until his next court appearance when the judge told him that if he went to trial and lost, the court would impose the maximum sixty year penalty. Due to his attorney's statement that he would lose at trial because of the confession and the court's threat to interpose the maximum sentence upon the conviction, which now seemed inevitable because of the confession, Dash withdrew his previous plea to plead guilty.

Dash made no claim of incompetence of counsel, and the Second Circuit was unwilling to hold, as had other courts,[29] that the existence of a coerced confession, in itself, was

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[29] In *Zachery* v. *Hale*, 286 F. Supp. 237, 240 (M.D. Ala., 1968), the writ was granted after a hearing wherein it was proved that the confession was coerced, the court stating:

> "The involuntariness of the confession is significant, even though Zachery upon advice of counsel . . . entered a plea of guilty, since one of Zachery's court-appointed counsel, the Honorable Hoyt W. Hill, testified before this court that the obtaining of the confession from Zachery was a factor that entered into his recommending to Zachery that he plead guilty. Therefore, we have one of Zachery's court-appointed counsel, as he was forced to do under the circumstances, give some consideration and weight to an illegal confession in recommending to Zachery that he enter a plea of guilty to the first degree murder charge. Thus it is readily apparent that the plea of guilty . . . was not voluntary; to the contrary, it was in part forced by reason of the illegal confession that had been extracted from him by the authorities on May 19, 1961."

In *United States ex rel. Cuevas* v. *Rundle*, 258 F. Supp. 647, 656-7 (E.D. Pa., 1966), in granting the writ after a hearing in which the confession was found coerced, the court held:

> "at the hearing held before me, counsel who represented the relator at his trial testified that the existence of the statement was the deciding factor in his advice to the relator to plead guilty to murder generally. It is obvious that the existence of the statement led to the relator's guilty plea."

See also *Smiley* v. *Wilson*, 378 F.2d 144, 148 (9th Cir., 1967) where in remanding for a hearing the court stated:

> "In our opinion, neither an assumption nor a finding upon evidence that a defendant had competent counsel, warrants rejection, without a hearing, of an issue based upon an adequate factual allegation that a plea of guilty was primarily motivated by a confession obtained by physical or mental coercion. The adequacy of counsel and the voluntariness of a plea are not sufficiently interrelated so that the proof of the first establishes, as a matter of law, proof of the second."

Contrast these decisions with the statement in petitioners' brief (p. 23): "The role of evidence, as such, has not been, nor should it be grounds for challenging the validity of a plea merely because it was taken into account in . . . [the] decision to plead."

sufficient to render the plea involuntary provided that the existence of the coerced confession played a role in competent counsel's advice to plead and the defendant's decision to do so. Instead, the court below held that when the defendant is represented by competent counsel and chooses to plead guilty rather than go to trial with an involuntary confession, he has, in most instances, deliberately by-passed the only available and acceptable state procedure for raising his constitutional claim, and since the state court refuses to give him collateral relief in such case, principles of comity require that he should not be allowed to present these claims in a federal court (A. 121-122).

The Second Circuit then distinguished this general situation from the situation confronting Dash and his attorney in 1959 when the decision to plead was made, by pointing out that:

> "... the only available state procedure by which [Dash] could contest the validity of the confession was the one declared retroactively unconstitutional in *Jackson* v. *Denno* ..." (A. 122).

Thus Dash, though represented by competent counsel:

> "... cannot be deemed to have waived his coerced confession claim by deliberately by-passing state procedures when the state failed to afford a constitutionally acceptable means of preventing that claim, and he cannot be deemed to have entered a voluntary plea of guilty if the plea was substantially motivated by a coerced confession the validity of which, he was unable, for all practical purposes, to contest" (A. 125).

The nexus between the coerced confession and the plea in *Richardson* was counsel's unwillingness to do anything meaningful to prevent the confession from being used to convict Richardson at trial and his erroneous advice that the confession claim could be raised collaterally despite the plea; the nexus in this case was counsel's inability to do anything meaningful to prevent the confession from being used to convict Dash at trial.[30]

In order to appreciate the impasse counsel faced in 1959, an appraisal of the *Stein*[31] procedure for litigating the confession issue at trial, as well as the coercive effect this procedure had upon the decision to plead, must be considered.

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[30] In this respect the decision below is comparable in analysis to *United States ex rel. Perpiglia* v. *Rundle, supra,* 221 F. Supp. 1003 and *United States ex rel. Collins* v. *Maroney,* 287 F. Supp. 420 (E.D. Pa., 1968) where relief was granted after a hearing.

In *Perpiglia,* the court held that while the defendant was competently represented by counsel, counsel was powerless to protect his rights because he was brought into the case only after "the police no longer feared a lawyer's presence" and that a plea of not guilty, "might well have seemed an act of defiance to the police, likely to offend the Judge as an arbitrary impediment to swift sentence where guilt had already been acknowledged." 221 F. Supp. at 1011-12. Contrary to the petitioner's representation that Perpiglia was not represented by counsel on the day of plea (Pet. Br. 30), the transcript of state court proceedings showed that the attorney was present that day (221 F. Supp. at 1007).

In *Collins,* the court found that competent counsel, through no fault of his or the defendant's did not know the facts surrounding the confession. In such a situation, counsel was unable to challenge the confession at trial, and because of counsel's ignorance of the facts and the defendant's ignorance of their legal significance, the failure to challenge the confession was not an intentional relinquishment or abandonment of a known right of privilege. 287 F. Supp. at 424-5.

[31] *Stein* v. *New York,* 346 U.S. 156 (1953).

The New York practice under the *Stein* rule was set out in the *Jackson* v. *Denno* opinion, 378 U.S. at 377-8. The confession was offered into evidence by the prosecutor at the trial itself, and the trial judge could exclude it at that stage, and not before, if in *no* circumstances it could be deemed voluntary. The jury was *not* excluded when the judge heard evidence on this issue. If there was a fair question of voluntariness *or* if the facts were in dispute, the judge had to allow the confession into evidence and leave both the question of its voluntariness and ultimate truthfulness to the jury, to be resolved together with the ultimate question of guilt or innocence.

Dash could get no reliable determination on the issue of voluntariness itself[32] because:

[32] The petitioners overlook the *Jackson* holding on this aspect (Pet. Br. 40). They also misconceive the reason for the *Jackson* holding that a reliable hearing on the issue of voluntariness of the confession, rather than a complete new trial in all *Stein* cases, was sufficient relief (Br. 40-41).

The limited remedy given by *Jackson* of granting hearings which would insure the reliability of the adjudication of voluntariness is all that is necessary to insure the reliability of the adjudication of guilt. If a confession, after a fair fact-finding process, were found coerced, then a new trial had to be ordered since the jury might have relied upon the illegal confession in determining guilt since there is no harmless error rule for involuntary confessions. *Culombe* v. *Connecticut*, *supra*, 367 U.S. at 621. But if the confession were found voluntary, then the jury could properly have relied upon it in bringing their verdict, and the verdict was not contaminated.

This is the same relief, with one exception, that the Second Circuit envisioned in the guilty plea case. If the confession was not coerced, then it did not infect the plea and, unless relief was warranted on grounds independent of the confession claim, the plea would stand. If the confession was coerced, then the inquiry was directed to whether it infected the plea *in fact*. If for instance, there was other independent evidence of guilt, then the plea would stand. In this last respect, the defendant who was coerced into confessing and then pleaded has a harder burden of proof than

"The New York jury is at once given both the evidence going to voluntariness and all of the corroborating evidence showing that the confession is true and that the defendant committed the crime. The jury may therefore believe the confession and believe that the defendant has committed the very act with which he is charged, a circumstance which may seriously distort judgment of the credibility of the accused and assessment of the testimony concerning the critical facts surrounding his confession" (378 U.S. at 381).

Even assuming the jury could overcome these obstacles and would conclude that the confession was involuntary,

"The jury . . . may find it difficult to understand the policy forbidding reliance upon a coerced, but true, confession . . ." (378 U.S. at 382)

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"It is difficult, if not impossible, to prove that a confession which a jury has found to be involuntary has nevertheless influenced the verdict, or that its findings of voluntariness, if this is the course it took, was affected by the other evidence showing the confession was true. But the New York procedure poses substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined" (378 U.S. at 389).

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the defendant who went to trial—the latter need only establish that the coerced confession went before the jury, not that it actually influenced the verdict; whereas under the Second Circuit decision the guilty pleading defendant must prove that the confession was the primary motivating factor in his decision to plead.

The inherent danger of this procedure was recognized by this Court in *Linkletter* v. *Walker*, 381 U.S. 618, 639 n. 20 (1964), *Johnson* v. *New Jersey*, 384 U.S. 719, 727-8 (1966) and *Tehan* v. *Shott*, 382 U.S. 406, 416 (1966), where the Court stated that retroactive application of *Jackson* v. *Denno*, *supra*, was necessary in order to protect

> "'the very integrity of the fact-finding process' and [avert] 'the clear danger of convicting the innocent.'" *Johnson* v. *New Jersey*, 384 U.S. at 727-8.[33]

The situation confronting Dash and which he claims underlay his attorney's advice to him and induced his plea, was this: The jury's appraisal of his credibility on the

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[33] One commentary has stated that the *Townsend* v. *Sain*, *supra*, directions to grant hearings in state cases where "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing" seemed "particularly directed at the *Stein* rule, an excellent example of a 'fact finding procedure . . . not adequate for reaching reasonably correct results.'" Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle* 39 N.Y.U. L. Rev. 78 at 114-15 (1964).

The fact that even under the *Stein* procedure, the New York appellate and the federal courts were able to find that confessions should have been excluded in some cases (Pet. Br. 43-4) does not establish that this Court committed grievous error in holding the *Stein* procedure so inherently unreliable that the confession issue in all cases tried prior to *Stein* had to be relitigated. To lift a phrase from Dr. Johnson (*Familiar Quotations* by John Bartlett, 14th Ed., p. 430-b), despite the *Stein* procedure, the findings in these cases that the confession was involuntary is "like a dog's walking on his hind legs. It is not done well; but you are surprised it is done at all".

Moreover, Dash and Williams were convicted at a time when the access of the indigent to the appellate process was severely limited by financial barriers that were interposed between perfecting an appeal and the ability of the indigent to pay for printing costs or to retain appellate counsel (see p. 43 *infra*). To the indigent the trial forum itself was the only forum he could be sure of having access to.

voluntariness issue would be colored by the evidence introduced to prove his guilt; even if the jury found the confession involuntary, there was a real danger that it would influence their verdict; even if the judge ruled the confession involuntary as a matter of law, the jury, having heard the *voir dire*, would know that he confessed and would know that he had a previous conviction for a felony.

That danger was more than "a construct of the fertile brains of defense lawyers without counterpart in reality" (dissenting opinion by Friendly, J., A. 160) in this case. The realities here were these: the evidence at the trial of Dash's co-defendants (see p. 8, n. 5, *supra*) showed that the complainant testified he was robbed by three men, Devine, Waterman and Fields. The taxi driver who took men from the scene of the crime testified that there were four men who engaged his cab. He could not identify them. Fields did not testify for the State.[34] Waterman's confession implicated Dash, but it could not be used as evidence against him.[35] Without Dash's own confession, the case was

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[34] Contrary to Judge Lumbard's dissenting opinion (A. 147), it is unclear whether Fields had implicated anyone, since, although Fields was arrested the day of the crime, "John Doe" indictments were returned against the other three men after Fields' arrest because their identities were then unknown to the Grand Jury (District Attorney Brief, *People* v. *Waterman, supra*, p. 4).

[35] The *amicus* brief states that a claimed violation of *Bruton* v. *United States*, 391 U.S. 123 (1968) would automatically entitle the defendant to a hearing on the voluntariness of his plea if these decisions are affirmed. This is not as clear as the *amicus* would make it. Before the decision in *Bruton* there were a number of steps defense counsel could take to insure that the co-defendant's confession would not be introduced at trial. He could move for a severance and he could move to have the co-defendant's confession redacted if the severance motion were denied. This latter was mandatory in New York. See *People* v. *Vitigliano*, 15 N.Y. 2d 360 (1965). It would appear to us that unless these preliminary attempts to prevent use of the co-defendant's confession were made,

exceedingly close. But since Dash confessed, even involuntarily, his confession would have gone to the jury with the rest of the evidence under the *Stein* procedure, either because there would have been disputed issues of fact as to what went on in the station house, or because it was for the jury to determine whether the absence of counsel after indictment rendered Dash's confession involuntary, just as they had to determine whether Waterman's confession was involuntary on this ground.

As this Court recognized in *Jackson* v. *Denno* (378 U.S. at 381-2), the jury might believe the confession because of the corroborating though inconclusive evidence of guilt and in a case like this where the evidence is legally insufficient without the confession, once having accepted the confession as true, might have found it difficult to understand policy forbidding reliance upon a coerced, but true confession.

What kind of choice did the State give Dash, himself in 1959, or an attorney competently representing Dash's best interests, when he was charged with a felony carrying a maximum sentence of sixty years? Assuming Dash's allegations are proved, the confession was coerced. After illegally obtaining his confession, the state gave him the option of going to trial before a jury which it did not insulate from hearing irrelevant, but highly prejudicial evidence on the constitutional issue of coercion, and if he

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that the *Bruton* decision could not be invoked in support of an allegation that the plea was coerced because the defendant had no way of preventing the *Bruton* violation from occurring. Of course, if counsel *refused* to do anything, in a situation where this rose to the level of a claim of incompetent representation, then the existence of the procedures for curing the potential defect might not prevent a defendant from raising this claim.

succeeded in convincing the jury that the confession was coerced, they might use the coerced confession to convict him anyway.

The Court has recognized that "voluntary" is not simply the result of having a sentient choice, and that "conduct devoid of physical pressure but not leaving a free exercise of choice is the product of duress as much so as choice reflecting physical constraint." *Haley* v. *Ohio,* 332 U.S. 596, 606 (1948).

In *Fay* v. *Noia, supra,* 372 U.S. 391, the Court held that a *habeas* applicant had not waived his right to challenge a coerced confession simply because he failed to raise that claim by an available state remedy.[36] There was no waiver in Noia's case because, although Noia had the choice to appeal or to stand pat despite the unlawful confession just as Dash had the choice to go to trial or to plead despite the unlawful confession, his choice was not a choice between fair options. On the one hand he could "sit content with life imprisonment"; on the other, he could "travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence." 372 U.S. at 440. Many men do not have the heart to seek vindication of their constitutional rights no matter what the cost, and Noia's decision, like Dash's, was involuntary because the alternatives left him without the ability to exercise a free choice.

[36] Noia, like Dash, had brought a state *coram nobis* proceeding on the ground that his confession was coerced, and the New York Court of Appeals in his case, as in Dash's case, held that his failure to utilize an available state remedy "does not entitle him later to utilize the . . . writ of error *coram nobis* . . . And this is so even though the asserted error or irregularity relates to a violation of constitutional right." *People* v. *Noia,* affirmed sub nom. *People* v. *Caminito,* 3 N.Y.2d 596, 601 (1958).

Moreover, Noia got relief even though he was not forced to elect between submitting to an unconstitutional procedure or to refrain from asserting his claimed constitutional right at all—the imposition of the death penalty upon retrial was a constitutionally permissible price the State could extract if the appeal were successful. 372 U.S. at 472 (dissenting opinion of Harlan, J.).

In this case, Dash's choice was the election of submitting his coerced confession claim to an unconstitutional trial procedure or foregoing his claim altogether. His dilemma was more grisly than Noia's, because the authority which, on his allegation, wrongfully extracted his confession, then denied him any constitutionally acceptable means for litigating their violation of his rights.[37]

Judge Kaufman recognized this with great clarity when he noted:

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[37] The Second Circuit has not been the only circuit to recognize the inherently coercive effect of the pre-Jackson procedure on the defendant's, and the defense attorney's, decision not to raise a voluntariness issue at trial. In *Moreno* v. *Beto*, 415 F.2d 154 (5th Cir., 1969), the court held that defense counsel's failure to raise a confession claim at trial because of his unwillingness to expose his client to the then existing Texas procedure for litigating the voluntariness issue before the jury was not a waiver. Counsel's flat answer at trial that he did not wish to inquire into the voluntariness of the confession but was limiting his inquiry to another theory, "does not preclude applicant from asserting his right to a constitutional mode of determining voluntariness, since the choice of trial strategy was dictated by an unconstitutional procedure." 415 F.2d at 157. The court went on to state that while there is no obligation for a court to inquire *sua sponte* into voluntariness where the issue is not raised, "the issue before us, however, . . . [is the] inability of defense counsel to have voluntariness determined under a procedure meeting constitutional standards and the effect of his decision not to subject his client to an unconstitutional state procedure," 415 F.2d at 158.

"The state allegedly illegally obtained the confession from the defendant and the state denied him any adequate means of suppressing it prior to trial. How the State can then be transformed into a disassociated neutral observer where the defendant pleads guilty because of that confession is too metaphysical for my comprehension. Once it has thus unfairly placed the defendant in an inherently coercive situation, I do not understand our solicitude for the State's claim that all pleas of guilty must under any and all circumstances be final, absolute and beyond judicial instruction" (A. 130).

Fay v. *Noia, supra,* is not the only case in which this Court has recognized that a Hobson's choice is no choice at all. In *Simmons* v. *United States, supra,* 390 U.S. 377, this Court held that a defendant in a criminal case cannot be compelled to elect between giving up a valid Fourth Amendment claim or waiving his Fifth Amendment privilege against self-incrimination. It was held "intolerable that one constitutional right should have to be surrendered in order to assert another." 390 U.S. at 394.

In 1959, neither Dash nor his lawyer had reason to suspect that if he went to trial and was convicted, he could later challenge the confession in a constitutionally acceptable procedure because of the decision in *Jackson* v. *Denno, supra.* See *Moreno* v. *Beto, supra.* It would be intolerable in this case if Dash had to surrender his right to have the voluntariness of his confession determined at all, because he refused to invoke an unconstitutional procedure to assert the right in 1959. See also *Garrity* v. *New Jersey,* 385 U.S. 493 (1967), and *Harrison* v. *United States, supra,* 392 U.S. 219, 224-6.

The petitioners have argued that "the benefits and safeguards in the prior New York trial and appellate procedure make it unreasonable to assume that defendants were deterred from going to trial" because of *Stein*. The Second Circuit refused to make an "assumption" on this one way or the other. It merely held that a defendant was entitled to offer proof of a hearing that was the reason for the plea in his case.[38]

Moreover, the petitioners' assumption that, as a matter of law, because of the benefits and safeguards of the *Stein* procedure *plus* the prior New York appellate procedure, no plea could ever be motivated by a coerced confession and the inability to receive a reliable trial determination of voluntariness, is disingenuous.

First of all, this Court in *Jackson* v. *Denno, supra,* has laid to rest all argument about the benefits and safeguards of the *Stein* procedure. Moreover, as we have noted above (*p. 37 n. 33*) for the indigent the hope of going to trial despite *Stein* in order to prevail on appeal on the coerced confession claim was not a real one. Until 1960, an indigent defendant had no absolute right to appeal *in forma pauperis* to the Appellate Division. Until that year, in order to obtain *forma pauperis,* he had to establish that there was merit to the appeal. *People* v. *Borum,* 8 N.Y.2d 177 (1960). He did not have the assistance of counsel to make the necessary showing of merit, as counsel's obligations to him terminated at sentence. See *People* v. *Kling,* 19 A.D.2d 750 (2nd Dept., 1963), aff'd 14 N.Y.2d 571 (1964). Moreover, if he succeeded in making the necessary showing of merit in

[38] "In these circumstances there is an issue as to the motivation of the plea which cannot be resolved without a hearing" (A. 125). See also concurring opinion of Kaufman, J. A. 133-4.

order to obtain *in forma pauperis* relief, he could have the original record or the assistance of counsel on the appeal, not both. See *People* v. *Pitts*, 6 N.Y.2d 288 (1959); *People* v. *Kalan*, 2 N.Y.2d 278 (1957); *People* v. *Breslin*, 4 N.Y.2d 73 (1958), overruled by *People* v. *Hughes*, 15 N.Y.2d 172 (1965). Until 1969, this all presupposed that the indigent defendant knew of his right to appeal and filed the notice of appeal within thirty days of the date of sentence, for neither the sentencing court nor his attorney had any obligation to advise him of these things,[39] and if he failed to file despite his ignorance of his rights, until 1969, he could not use the writ of error *coram nobis* to have his appeal filed out of time. See *People* v. *Kling*, *supra*, and *People* v. *Weeks*, 23 A.D.2d 684 (2nd Dept., 1965), aff'd 16 N.Y.2d 896 (1965), cert. den. 384 U.S. 955 (1966), overruled by *People* v. *Montgomery*, 24 N.Y.2d 130 (1969), and *People* v. *Calloway*, 24 N.Y.2d 127 (1969).

In 1959, when Dash was convicted and in 1956, when Williams was convicted, the safeguards of the New York appellate procedure were munificent in theory, but ephemeral, as a practical matter, for the indigent defendant. His one real possibility for successfully challenging the confession was his trial and the only procedure available to him at trial was one which impaired the integrity of the fact finding process itself, and did not avert the clear danger of convicting the innocent. *Johnson* v. *New Jersey*, *supra*, 384 U.S. at 727-8.

The petitioners seek to divert this Court from the real issue at bar—i.e., the coercive effect of the *Stein* procedure

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[39] This was changed by court rule. 22 New York Codes, Rules and Regulations Section 606.5; 671.3; 671.5; 821.2; 821.3; 1022.13 (1968).

upon the decision to plead guilty in cases where an allegedly coerced confession had been obtained. They couch this brief in terms of the retroactivity of *Jackson* v. *Denno, supra,* and thereby place undue weight upon a concept which does not have true application in these cases.

The effect of the *Stein* procedure upon the decision to forego asserting a valid coerced confession claim at trial is only at issue in two of the three cases here for review—Dash and Williams, for it becomes relevant only where a defendant alleging that his plea is "based on" a coerced confession, also alleges that his counsel was competent, for in such cases, it supplies the nexus between the confession and the plea.

Neither the petitioners nor their *amicus* acknowledge that Richardson and to an extent Williams do not present the *Jackson* question at all. They also misconstrue and magnify the importance of the *Jackson* v. *Denno,* "retroactivity" issue in the *Dash* decision itself.

Petitioners state that the court below presumed "the invalidity of all pleas entered before June 22, 1964, where it is alleged that [an allegedly coerced] confession was obtained" (Pet. Br. 40). This characterization is inaccurate.

The Second Circuit merely viewed the *Stein* procedure as a fact of life facing any defendant who had to make the decision to plead or to go to trial before 1964. He, and his attorney, had to take the *Stein* procedure into account in determining whether or not to stand trial and seek vindication of the right not to be coerced into confessing, or to plead and forego asserting that right. The Second Circuit did not view the retroactive overruling of *Stein* as *ipso facto,* resulting in the automatic vacatur of all pleas in all

cases where coerced confessions had in fact been obtained (A. 120), much less in all cases where a plea was entered during the *Stein* era.

It is true that any person who had a coerced confession claim during the *Stein* era was confronted with a constitutionally defective procedure for contesting it at trial; however, the Second Circuit clearly limited its decision to grant a hearing only in those cases where it was specifically alleged, and supported by other evidence, that the coerced confession together with the coercive effect of the *Stein* procedure was the prime inducement for the plea.

In this respect, the Second Circuit's is no different than *Johnson* v. *New Jersey, supra,* 384 U.S. 719, 730, because the Circuit merely held that the alleged violation of constitutional rights, and the inadequacy of the forum for asserting those rights, is "simply another factor" to be taken into account in determining the voluntariness of the plea (A. 119).

Despite this, the petitioners have interjected the argument that the Second Circuit's decision permitting defendants, competently represented by counsel who allege their pleas were nonetheless based upon a coerced confession to have hearings, should not stand because *Jackson* v. *Denno, supra,* should not be retroactively applied to guilty plea cases; while in the same breath, conceding that "(i)ndeed, the issue is not strictly one of retroactivity" (Pet. Br. 47).

We will address ourselves to the other justifications advanced by petitioners for asking this Court to make a non-retroactivity ruling in a case where "the issue is not strictly one of retroactivity."

The first argument is that *Jackson* is retroactive in the trial situation because that decision went to the integrity of the fact finding process, but that *Jackson* had no impact where there has been a plea because "the fact finding process is limited to the defendant's admission in open court that he is guilty of the crime to which he is pleading" (Pet. Br. 48).

If a defendant was coerced into confessing his guilt to the police and then coerced into pleading guilty because *Stein* gave him no fair way to challenge the confession at trial (and New York gave him only limited access to its appellate courts), the in-court admission of guilt is as unreliable as the primary confession which motivated it. The in-court admission cannot be taken as an isolated instant in time, divorced from the unreliability of coerced confession which produced it. If the confession was coerced, and the plea based on the confession, then the in-court admission was based upon a declaration from which no civilized forum will infer guilt. When so predicated, the fact that the in-court admission was made in a court room rather than in the back room of a precinct house, does not establish its integrity (see *supra* Point I).

The second prong of the petitioners' argument—the prosecutor's reliance upon *Stein* (Pet. Br. 48-9 and 52-3)—is irrelevant where the constitutional error goes to the integrity of the fact-finding process itself. *Roberts* v. *Russell*, 392 U.S. 293, 295 (1968).[40]

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[40] The *Stein* rule, like the rule in *Delli Paoli* v. *United States*, 352 U.S. 232 (1957) had been under attack since its inception. (See *Jackson* v. *Denno*, *supra*, 378 U.S. at 382 n. 10 and Note, *supra*, 39 N.Y.U. L. Rev. 78.) Moreover, the prosecutor's "good faith" in the plea situation where there was an allegedly coerced confession cannot be as readily assumed as it can in the trial situa-

Moreover, the reliance argument can be answered in another way. In *Harrison* v. *United States, supra,* the Court stated:

> "the exclusion of an illegally procured confession and of any testimony obtained in its wake deprives the Government of nothing to which it has any lawful claim and creates no impediment to legitimate methods of investigating and prosecuting crime. On the contrary, the exclusion of evidence causally linked to the Government's illegal activity no more than restores the situation that would have prevailed if the Government had itself obeyed the law." (392 U.S. at 224 n. 10.)

In cases where the guilty plea, after a hearing, is found to be based on a coerced confession, vacatur of the conviction deprives the State of nothing to which it had lawful claim.

The third argument is that the effect of the Second Circuit's decision upon the administration of justice would be

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tion (Pet. Br. 48). In the trial situation, the prosecutor could introduce an allegedly coerced confession into evidence and rely upon the *Stein* procedure to insure that the confession would not contaminate the verdict and hence the conviction, though even in this situation, he had the windfall of the jury hearing the confession though they might deem it coerced. In the plea situation, the allegedly coerced confession could be used to get a conviction provided the defendant bargained away his right to go to trial. See Altschuler, *The Prosecutor's Role in Plea Bargaining,* 36 U. Chi. L. Rev. 50, 80-83 (1968). To the extent the potential inadmissibility of the confession played a role in the prosecutor's willingness to compromise the case, then actual bad faith would be present. Contrary to the petitioners' assertions (Pet. Br. 56), the State is entitled to *no* presumption that it would neither introduce the illegal evidence at trial or use it to secure the plea because to so presume ignores not only the realities of the plea bargaining situation but also every case cited by petitioners (Pet. Br. 43-44) where convictions were reversed because the State had in fact obtained and introduced an involuntary confession.

"staggering". This argument is also made in the *amicus* brief filed by the New York County District Attorney where the full parade of horribles is once again brought out for display.

Judge Kaufman addressed the major part of his concurring opinion below to this consideration (A. 131 *et seq.*) and little can be added to what he has written.

We make only two observations: First, we have cited in the appendix to this brief a number of cases arising in other circuits and states, where collateral attacks upon pleas allegedly based on coerced confessions have been permitted. These jurisdictions have lived with the "floodgates" (Pet. Br. 54) open for the past several years, and have not been besodden by the now predicted (Pet. Br. 54; Amicus Br. 8-9) tidal wave of writs. Second, the court below recognized that its decisions in these three cases would have greatest impact in cases raising the claim of coerced confession from the era that began with the Wickersham report (IV National Commission on Law Observance & Enforcement, Report on Lawlessness in Law Enforcement 21931) and produced cases like *Spano* v. *New York, supra, Leyra* v. *Denno, supra, Fay* v. *Noia, supra* (see *United States ex rel. Caminito* v. *Murphy,* 222 F.2d 698 (2nd Cir., 1955), cert. den. 350 U.S. 896 (1955));[41] an era in which the prosecution had argued "that law enforcement methods such as those under review are necessary to uphold our laws." *Chambers* v. *Florida,* 309 U.S. at 240. And, indeed the 100 cases, selected at random from the files of the New York County District Attorney's Office (Amicus Br. A. 1-4) all arose during the last decade of that

[41] See generally, Paulsen, *The Fourteenth Amendment and the Third Degree,* 6 Stan. L. Rev. 411 (1954).

era. If any one of these 100 cases involve a claim that the defendant was forced by brutality or psychological coercion to confess and that his conviction was based upon that confession, and that claim can be proved[42] at a hearing, the game has been worth the candle. Moreover, the rights afforded by the Constitution are personal rights "which the State must respect, the benefit of which every person may demand." *Hill* v. *Texas,* 316 U.S. 400, 406 (1942). The fact that "the facilities of the courts, prosecutors, police and defense bar [are] already over-taxed . . ." (Amicus Br. 9) is an argument that should go to the legislatures in support of more adequate funds, not an argument that should come to this Court as a reason for withholding justice if justice is both owing and overdue.

3. Williams

Williams alleged that he confessed to a crime he did not commit after being deprived of food and sleep and

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[42] Both the petitioner and the *amicus* make much of the argument that reconstruction of the record after the fact of conviction is a difficult one (Pet. Br. 49, Amicus Br. 9). It would appear that the defendant has the burden of proving by a preponderance of the evidence both the fact that his confession was coerced and the fact that his plea was based upon the confession, since this is a collateral attack upon a judgment of conviction, see *Walker* v. *Johnston, supra,* 312 U.S. at 286. Thus the difficulty of reconstruction is primarily a defense problem. Moreover, any collateral proceeding to determine whether certain off-the-record events have occurred entails this same difficulty. Yet the writ of error *coram nobis,* designed expressly for this purpose, is still permitted in New York and reaches situations where the task of reconstruction is far more difficult than it would be here. See for example *People* v. *Boundy,* 10 N.Y.2d 518 (1962) (*coram nobis* hearing ordered on issue of defendant's sanity which had not been developed at the time he pleaded guilty). See also *United States ex rel. La Near* v. *Warden,* 306 F.2d 417 (2d Cir. 1962) (*habeas corpus* hearings ordered on the constitutionality of a prior out-of-state conviction, despite the fact that the evidence necessary to prove or disprove the allegation was not in the jurisdiction of the hearing court).

physically threatened. According to the allegations of the petition, court-assigned counsel, who was thereafter appointed to represent him was inadequate and incompetent. Williams only entered the guilty plea because his lawyer, although knowing of a valid alibi defense, told him the plea was to a misdemeanor. Williams further alleged that outside of the illegal confession, there was no evidence[43] connecting him to the commission of the crime, and argued that he did not waive his right to challenge the confession by entering the plea because he could not have received a fair determination on the issue of voluntariness of the confession or a fair trial under the then existing New York trial procedure.

According to Williams' allegations both the alleged incompetence of counsel and the alleged inability to receive a fair determination of the coerced confession issue played a role in his determination to plead guilty. The Second Circuit looked to both these factors to supply the nexus between the coerced confession and the guilty plea (A. 176-77).

If assigned counsel refused to prepare for trial on the alibi defense, this was a compelling indication that his preparation on the confession issue would also be perfunctory. As we have argued in Richardson's case (*supra*, pp. 27-9) without the effective assistance of counsel, the choice between trial or plea was not a fair choice between viable alternatives. Moreover, without the effective assistance of counsel the initial coercion producing the confes-

[43] In his dissenting opinion, Judge Lumbard states that undoubtedly the victim could have identified her assailant. However, in New York, a conviction for rape or lesser included crimes cannot be had upon the uncorroborated testimony of the victim. N. Y. Penal Law, 1909, §2013.

sion would remain unbroken since no neutral agent was interposed between the coerced confession and the plea itself, and hence there would be no break in the stream of events sufficient to insulate the plea from the effect of all that went before.

Even if counsel were willing to contest the confession at trial, the *Stein* procedure would have prevented a reliable determination of the voluntariness issue, and would have offered no assurance that if the jury found the confession involuntary, they would not use it as evidence of guilt (see *supra,* pp. 34-7). Like Dash's, this case was a close one on its facts. Even if the complainant could make a positive identification, the confession was necessary to supply the necessary corroboration under New York law, New York Penal Law, 1909, §2013. If the witness could not identify him, the confession was an absolutely essential element of the prosecution's case. In such a case, even if the jury found the confession coerced but also found that the crime had been committed, the kind of tension between not using a coerced but true confession to convict and thus permitting an obviously guilty man to go free described in *Jackson* v. *Denno, supra,* 378 U.S. at 382 was palpably present.

In this case, the respondent made two allegations, either of which, if proved at a hearing, would establish that his plea of guilty was "based on" a coerced confession and hence that his conviction had been obtained in violation of his right to due process of law, therefore the court below did not err in ordering a hearing on this claim.

POINT III

In Each Case, the Respondent Has Made Allegations Independent of the Confession Claim Which Are Not Patently Frivolous or False on Consideration of the Whole Record, and Which if Proved at a Hearing Would Entitle Him to Relief Under the Fourteenth Amendment.

In Points I and II above, we have argued that the court below correctly held that the respondents were entitled to a hearing upon their allegations that their pleas of guilty were based upon coerced confessions. However, the decisions below remanded each case for a hearing upon other allegations, independent of the coerced confession claim (Dash, A. 125; Richardson, A. 171-2; Williams, A. 177).

In each case the respondent has alleged other facts, independent of the confession claim, entitling him to a hearing on the ground that his guilty plea was involuntary and hence obtained in violation of his Fourteenth Amendment rights.

1. Richardson

In addition to the coerced confession claim, Richardson alleged that he was represented by incompetent court assigned counsel who conferred with him for only ten minutes in a capital case and who told him he would get the same amount of money for representing him regardless of the outcome.

Petitioners sought to controvert these allegations with the affidavit of assigned counsel prepared in 1963 and submitted to the New York Supreme Court in order to receive compensation for his services to Richardson. It states

merely that counsel studied the reports finding the defendant sane and "the law dealing with the subject of insanity" and had "conferences with the defendant and with each other relative to preparations for trial as well as relative to the advisability of taking . . . a compromise plea" (A. 106). The reference to "conferences" is vague in the context in which it appears. Was there one conference with Richardson and another with co-counsel? Was there one conference with Richardson relative to trial preparation and another with co-counsel concerning the advisability of taking a plea? The possible combinations are infinite and do not invariably add up to the fact that counsel is stating he had more than one conference with Richardson relative to trial preparation. It cannot be said, as the petitioner argues, that Richardson's allegation that his attorney barely conferred with him "is belied by the attorney's affidavit" nor can it be said that the affidavit conclusively demonstrates "that both assigned attorneys thoroughly examined the possibilities of going to trial" (Pet. Br. 38).[44]

Even assuming that the attorney's affidavit flatly contradicted Richardson's allegation, this merely raises an issue of fact for a hearing. *Machibroda* v. *United States, supra,* 368 U.S. 487, 494; *Walker* v. *Johnston, supra,* 312 U.S. at 284-6.

The allegation of inadequate assistance of counsel is one, which if proved at a hearing, would entitle respondent to relief. Since *Powell* v. *Alabama,* 287 U.S. 45 (1932) it has been "assumed by most courts to be axiomatic that

[44] It cannot even be said that the affidavit shows that the attorney thoroughly examined his own affidavit, as he dated it one month prior to the plea and stated that the defendant was sentenced fourteen days before sentence was actually imposed.

any right to representation [by counsel] involves a right to 'effective' or 'adequate' assistance." Waltz, *Inadequacy of Trial Representations as a Ground for Post Conviction Relief in Criminal Cases,* 59 N.W. L. Rev. 289, 292 (1965) and cases cited therein. While some aspects of the right to the effective assistance of counsel have posed hard questions, no court decision or legal commentator has ever challenged Mr. Justice Sutherland's observation in *Powell* that "consultation, thoroughgoing investigation and preparation" are "vitally important" to the defense of a criminal case. 287 U.S. at 57.

In *Brooks* v. *State of Texas,* 381 F.2d 619 (5th Cir. 1967), the writ was granted after a hearing in which it was found that the petitioner's attorney only consulted with him for some fifteen to twenty-five minutes before trial and in *Wilson* v. *Rose, supra,* 366 F.2d 611, 613 the writ was granted where a hearing established that, prior to advising his client to plead guilty, the defendant's attorney "did not discuss possible defenses with appellee; indeed he did not discuss the facts of the case with appellee at all. Appellee's attorney testified that he listened to appellee's story and to the complaining witness' testimony at the preliminary examination (which appellee told him was not true), but made no effort to investigate either the factual circumstances of the case or the applicable law; he examined no witnesses; he did not examine the police reports, nor the complaining witness' prior statements to the police." In *Wilson,* the court stated that a collateral attack on a judgment must be sustained in a guilty plea case "where, as in this case, counsel was available but his performance was inadequate." 366 F.2d at 615. This is Richardson's claim in this case, and since no state court hearing

had been held upon his allegation, the decision below granting him the opportunity to prove his allegations in a federal hearing was correct under *Townsend* v. *Sain*, *supra*, 372 U.S. at 312-13.

2. Dash

In his petition for the writ, Dash alleged his plea was induced not only by the coerced confession but by a threat by the trial judge to impose the maximum possible sentence if he went to trial. This ground was "dismissed from consideration by the [district court] judge because the report of the state court proceedings, *People* v. *Dash*, 16 N.Y.2d 493 (1965), indicated that the prosecutor had filed an affidavit categorically denying that the trial judge ever threatened the defendant" (A. 124).

The court below was correct in holding that this allegation stated a valid claim for relief because a conviction based upon a plea induced by threats is involuntary. *Waley* v. *Johnston*, *supra*, 316 U.S. 101; *Machibroda* v. *United States*, *supra*, 368 U.S. 487; *United States ex rel. McGrath* v. *LaVallee*, 319 F.2d 308 (2nd Cir., 1963); *United States* v. *Tateo*, *supra*, 214 F.Supp. 560.

The court below was also correct in remanding the case for a hearing upon the allegation.

First of all, the district court below had not called for or examined the state court record. It merely referred to the New York Court of Appeals opinion as categorically refuting the claim and rested its decision upon this basis (A. 37). Even before *Townsend* v. *Sain*, *supra*, 372 U.S. 293, it was error for the district court to dismiss a *habeas* application by merely relying upon the facts and conclusions

stated in a state court opinion without making any examination of the state court record whatsoever. *United States ex rel. Jennings* v. *Ragen*, 358 U.S. 276 (1958).

Since no examination of the state court record had been made, a remand was clearly necessary if only for this limited purpose.

However, the state *coram nobis* proceeding in which this claim was raised was denied without a hearing.[45] Clearly a triable issue of fact had been raised by the petition and the assistant district attorney's affidavit in denial. *Machibroda* v. *United States, supra*, 368 U.S. at 494-5. Under *Townsend* v. *Sain, supra*, a hearing was required because there were off the record facts in dispute and the state court had not "after a full hearing reliably found the relevant facts." 372 U.S. at 312-13.

The decision below remanding for a hearing upon the allegation that the plea was coerced by threats of the trial judge was correct and should be affirmed.

3. Williams

In his petition for the writ, Williams alleged that he was out of the state when the crime was committed, but that his attorney (later disbarred) knowing of this, talked him into pleading guilty and misled him into thinking he was pleading guilty to a misdemeanor rather than a felony. He alleged he was not told of the nature of his plea or the nature and meaning of the charge when he entered the plea.

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[45] The two dissenting judges in the New York Court of Appeals had voted to remand for a hearing since "the petition raises a triable issue of fact as to whether the guilty plea was induced by coercion . . ." *People* v. *Dash, supra*, 16 N.Y.2d at 494-5.

The petitioner does not discuss these allegations other than to deprecate the inartful manner in which this *pro-se* petitioner raised them (Br. 8, 38).[46] The petitioner also does not mention the exhibit attached to its own answer in the district court below (A. 65-6) which shows that Williams had once before been identified in New York when he was in jail in Ohio.

The court below held that:

> "If [Williams] pleaded guilty on the advice of a lawyer who knew of the existence of a perfectly good alibi defense, then there is certainly some question as to whether [he] was adequately represented by counsel when he entered his guilty plea. '[I]t is not for a lawyer to fabricate defenses, but he does have an affirmative obligation to make suitable inquiry to determine whether valid ones exist'. *Jones* v. *Cunningham*, 313 F.2d 347, 353 (4th Cir.) cert. den. 375 U.S. 832 (1965). See also *Quarles* v. *Balcom*, 254 F.2d 985 (5th Cir., 1966) . . ." (A. 177).

To the same effect: *United States* v. *Rogers*, 289 F. Supp. 726, 729 (D. Conn., 1968) where a plea was vacated pursuant to a 28 U.S.C. §2255 motion where counsel failed

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[46] Petitioner's statement that Williams first raised this claim eight years after conviction is unsupported by the record. Williams had brought six collateral proceedings prior to the time he filed the federal writ and since none of those petitions were before the district court below, it is impossible to tell when the claim was first raised. In any event, the length of time is irrelevant. *Pennsylvania ex rel. Herman* v. *Claudy*, *supra*, 350 U.S. at 123. Appellant also attacks the allegation on the ground it was fully spelled out in the brief annexed to the petition, rather than in the petition itself. That *pro-se* petitioners are not chargeable with the technical skill of the trained attorney is well established. *Price* v. *Johnston*, 334 U.S. 266 at 292 (1948).

to investigate an alibi defense and the court found that counsel "despite defendant's protestations of innocence . . . proceeded to recommend a guilty plea without any effort on his part to ascertain whether defendant was in fact guilty and without any warning by counsel to defendant that a guilty plea should be entered only if defendant really was guilty."

The decision below granting a hearing on the competence of counsel claim is clearly correct, under *Townsend* v. *Sain, supra,* since the state court did not give Williams a hearing upon this allegation.

The court below also held that "if petitioner was misled by his attorney into thinking he was pleading guilty to a misdemeanor, there is some question as to whether the guilty plea was made intelligently" (A. 177). This is no novel doctrine of law. See *Anders* v. *Turner, supra,* 379 F.2d 46, 48-9 and *Pilkington* v. *United States, supra,* 315 F.2d 204, 207.

The petitioner never controverted this allegation and supported it, inferentially, by its Exhibit A (A. 65-6) showing that Williams had never before been convicted of a felony. Nor did the petitioner produce the minutes of pleading to controvert Williams' allegation that the trial court never told him he was pleading to a felony.

Since the allegations as to the incompetence of counsel and the misapprehension of the nature of the plea were uncontroverted by the record, and not patently false or frivolous and since there had been no state court hearing on the claim, the court below did not err in ordering a hearing upon the petition.

Conclusion

In each of the three cases here for review, the respondent made allegations of off-the-record facts which called into question the constitutionality of his plea of guilty. These allegations were first made in the state courts of conviction, but the state *coram nobis* petitions were denied without a hearing in all of the cases. Because of the decision in *Townsend* v. *Sain, supra,* 372 U.S. 293, the court below was obliged to decide whether to hold an evidentiary hearing on these allegations (A. 114). In each case, it determined that such a hearing was necessary.

The court below held that a hearing was necessary where it is alleged that a plea of guilty is not voluntary because it was induced by the existence of threatened use of an allegedly coerced confession (A. 114), and where it was further alleged, with particularity, the manner in which the confession rendered the plea involuntary (A. 120). In each case, the court of appeals considered the specific allegations in the petition, and found that a sufficient nexus between the allegedly involuntary confession and the plea had been alleged to exist so that a hearing was warranted.

The court below also considered the allegations made in each case of other facts, in addition to the coerced confession claim, which, if proved at a hearing, would render the plea unvoluntary. In each case, the court below held that under *Townsend* v. *Sain, supra,* a hearing was necessary.

For the reasons stated in the points of argument above, the respondents respectfully pray that the judgment of the United States Court of Appeals for the Second Circuit be affirmed in each case.

Respectfully submitted,

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APPENDIX

The cases cited below are the leading ones in which various courts have recognized that the allegation that a guilty plea was based upon a coerced confession states a claim for relief under the Fourteenth Amendment, and where the case was either remanded for a hearing, or where relief was either granted or denied after a hearing. A few cases hold that although the claim is actionable under the Fourteenth Amendment, no hearing was necessary because of deficiencies in the specific allegations.

Third Circuit:

United States ex rel. Armstead v. *Rundle*, 381 F.2d 370 (1967);
United States ex rel. Collins v. *Maroney*, 382 F.2d 547 (1967) on remand *United States ex rel. Collins* v. *Maroney*, 287 F. Supp. 420 (E.D. Pa. 1968);
United States ex rel. Kern v. *Maroney*, 403 F.2d 205 (1968);
United States ex rel. McCloud v. *Rundle*, 402 F.2d 853 (1968);
United States ex rel. Sanders v. *Maroney*, 397 F.2d 267 (1968);
United States ex rel. Cuevas v. *Rundle*, 258 F. Supp. 647 (E.D. Pa. 1966);
United States ex rel. Heath v. *Rundle*, 298 F. Supp. 1207 (E.D. Pa. 1969);
United States ex rel. Perpiglia v. *Rundle*, 221 F. Supp. 1003 (E.D. Pa. 1963).

Fourth Circuit:

Jones v. *Cunningham*, 297 F.2d 851 (1962);
Reed v. *United States*, 291 F.2d 856 (1961);
White v. *Pepersack*, 352 F.2d 470 (1965);

Fifth Circuit:

Bell v. *State of Alabama*, 367 F.2d 243 (1966), cert. den. 386 U.S. 916 (1967), after hearing writ denied, see 391 F.2d 286 (1968);
Bridges v. *Dees*, 404 F.2d 341 (1968);
Brown v. *Beto*, 377 F.2d 950 (1967);
Carpenter v. *Wainwright*, 372 F.2d 940 (1967);
Conner v. *Beto*, 393 F.2d 485 (1968);
Evans v. *Beto*, 415 F.2d 1129 (1969);
Newberry v. *Beto*, 406 F.2d 1325 (1969);
Smith v. *Wainwright*, 373 F.2d 506 (1967);
Tuggle v. *Beto*, 374 F.2d 618 (1967);
Williams v. *Wainwright*, 415 F.2d 1136 (1969);
Zachery v. *Hale*, 286 F. Supp. 237 (N.D. Ala. 1968).

Sixth Circuit:

Kott v. *Green*, 387 F.2d 136 (1967).

Ninth Circuit:

Bright v. *Rhay*, 391 F.2d 915 (1968);
Conley v. *United States*, 407 F.2d 45 at 47 (1969);
Doran v. *Wilson*, 369 F.2d 505 (1966);
Elmer v. *United States*, 378 F.2d 672 (1967);
Gladden v. *Holland*, 366 F.2d 580 (1966);
Hale v. *Wilson*, 364 F.2d 906 (1966);
Hardee v. *Nelson*, 407 F.2d 1315 (1969);
Johnson v. *Wilson*, 371 F.2d 911 (1967);
Jones v. *United States*, 384 F.2d 916 (1967);
Knowles v. *Gladden*, 378 F.2d 761 (1967);
Sessions v. *Wilson*, 372 F.2d 366 (1967);
Smiley v. *Wilson*, 378 F.2d 144 (1967);
Smith v. *Wilson*, 373 F.2d 504 (1967).

California:

People v. *Spencer*, 66 C.2d 158 at 162 n. 3, 424 P.2d 715 at 719 n. 3, 57 Cal. Rptr. 163 at 167 n. 3 (1967), en banc.

Connecticut:

Williams v. *Reincke*, 157 Conn. 143, 249 A.2d 252 (1968).

Florida:

Williams v. *Florida*, 174 So.2d 97 (Dist. Ct. of App. Sec. Dist. Fla. 1965), app. dism. 179 So.2d 211 (Fla. 1965), cert. den. 382 U.S. 963 (1965).

Illinois:

People v. *Shelton*, —— Ill.2d ——, 248 N.E.2d 65 (1969);

People v. *Wilson*, 29 Ill.2d 82, 193 N.E.2d 449 (1963).

North Carolina:

Parker v. *State*, 2 N.C. App. 27, 162 S.E.2d 526 (1968), cert. granted 395 U.S. 974 (1969), No. 268, O.T. 1969.

Oregon:

Dorsciak v. *Gladden*, 246 Or. 233, 425 P.2d 177 (1967) en banc.

Pennsylvania:

Commonwealth v. *Baity*, 428 Pa. 306, 237 A.2d 172 (1968);

Commonwealth v. *Emerick*, 434 Pa. 256, 252 A.2d 365 (1969);

Commonwealth v. *Garrett*, 425 Pa. 594, 229 A.2d 922 (1967);

Commonwealth v. *Young*, 433 Pa. 146, 249 A.2d 559 (1969).

Virginia:

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SUPREME COURT, U. S.

FILED

JAN 12 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 153

DANIEL McMANN, Warden of Clinton Prison, Dannemora, New York and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

—against—

WILBERT ROSS, WILLIE RICHARDSON, FOSTER DASH and McKINLEY WILLIAMS,

Respondents.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION, *AMICI CURIAE*

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Respondents.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION, *AMICI CURIAE*

Interest of *Amici*

The American Civil Liberties Union and its New York affiliate, the New York Civil Liberties Union, are committed to the protection of constitutional rights and individual liberties safeguarded by the Bill of Rights. In particular, we have acted to insure that the full measure of due process of law, the privilege against self-incrimination, and the right to counsel are afforded to all criminally accused, regardless of their status in society. In furtherance of these goals, *amici* have traditionally defended the rights of

citizens of every persuasion in the courts, the legislatures, and the executive departments of government.*

Statement of Question Presented

The question presented is whether a state prisoner is entitled to an evidentiary hearing where his habeas corpus petition alleges substantial facts, without contradiction by the state, demonstrating that he was convicted upon an involuntary plea of guilty induced by the existence and threatened use of a coerced confession.

Statement of the Case

The four Respondents in these cases all filed petitions for habeas corpus in three different district courts of the Second Circuit, alleging, *inter alia*, that their pleas of guilty in New York State prosecutions had been unconstitutionally coerced by the existence and threatened use of coerced confessions. None of the respondents was afforded an evidentiary hearing on the claims either in the state courts or the District Courts.[1] Each of these cases, of course, presents its own particular set of facts, but the main issue before the Court can best be understood by a brief outline of one of the cases, that of Foster Dash.

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* The attorneys for the parties have consented to the filing of this brief. The letters of consent are on file with the Clerk.

[1] While the petition for certiorari was pending, Wilbert Ross died, and accordingly by order of this Court, dated December 8, 1969, the judgment of the Court of Appeals was vacated, and the case was remanded with directions that it be dismissed as moot.

In his application for habeas corpus to the United States District Court for the Southern District of New York, Dash alleged:

(1) On February 26, 1959, he was arrested, taken to a police station in New York City and intensively interrogated by a group of officers about the commission of various crimes, including a robbery for which he had been indicted; his repeated requests for counsel were denied, and he was not advised of his right to remain silent; he was beaten by police officers and kept incommunicado for almost eight hours; finally he was threatened by an assistant district attorney that every unsolved crime would be charged to him if he did not confess (A. 24-25). Despite consistently maintaining his innocence, he finally was coerced into signing a confession (A. 25).[2]

(2) Approximately one month later, Dash pleaded guilty to second degree robbery (A. 26). He had previously been advised by his court-appointed counsel that nothing could be done about the confession and that because of the confession, Dash should plead guilty (A. 25-26). Dash had also previously been admonished by the trial judge that if he went to trial, he would get the maximum sentence for a crime which the judge regarded as nearly as bad as murder (A. 26).

(3) Dash was then sentenced to a term of 8 to 12 years as a second felony offender (A. 23). No appeal

[2] The conviction of two of Dash's co-defendants who went to trial was set aside because their confessions were held to have been coerced. *People* v. *Waterman*, 12 A.D.2d 84, 208 N.Y.S.2d 596 (1st Dep't 1960), *aff'd*, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961).

was taken from the judgment of conviction (A. 23). Later, his state petition for a writ of error *coram nobis* on the ground that his guilty plea was induced by a coerced confession was denied without a hearing and the decision was affirmed by the Appellate Division, and the New York Court of Appeals. *People* v. *Dash*, 21 A.D.2d 978 (1st Dep't 1964), *aff'd*, 16 N.Y.2d 493, 208 N.E.2d 171, 260 N.Y.S.2d 437 (1965) (A. 23, 33).

The District Court for the Southern District of New York dismissed the petition, without holding a hearing, on the ground that a "voluntary plea of guilty entered on advice of counsel constitutes a waiver of all nonjurisdictional defects in any prior stage of the proceedings against the defendant" (A. 37).

The Court of Appeals for the Second Circuit reversed the dismissal of the petition and remanded the case to the District Court with instructions to hear and determine Dash's application, unless the state courts afforded him a hearing to determine whether his plea was voluntary. In an *in banc* decision representing the views of six Judges, the Court held that an alleged coerced confession may be a relevant factor in the determination of the voluntariness of a guilty plea and that the standards of *Townsend* v. *Sain*, 372 U.S. 293 (1963), apply in determining whether or not to hold an evidentiary hearing with respect to a claim that a plea was not voluntary because it was induced by the existence, or threatened use of, an allegedly coerced confession. The Court then went on to hold that Dash's allegations raised a sufficient question as to the voluntariness of the plea of guilty to require a hearing before the issue is determined (A. 125). In so holding, the Court noted the only means by which Dash could have challenged the

validity of the confession under New York law was the procedure already held by this Court to be retroactively unconstitutional in *Jackson* v. *Denno*, 378 U.S. 368 (1964). This fact posed a dilemma for Dash, for as the Court of Appeals noted,

> The petitioner cannot be deemed to have waived his coerced confession claim by deliberately by-passing state procedures when the state failed to afford a constitutionally acceptable means of presenting that claim, and he cannot be deemed to have entered a voluntary plea of guilty if the plea was substantially motivated by a coerced confession the validity of which he was unable, for all practical purposes, to contest (A. 125).

The Court of Appeals emphasized that its decision was limited to Dash's particularized allegations as to how his coerced confession induced his plea and indicated that the conviction would of course stand if, after a full and fair evidentiary hearing, the confession was found to be voluntary.

ARGUMENT

A state prisoner is entitled to an evidentiary hearing where his habeas corpus petition alleges substantial facts demonstrating that his guilty plea was involuntarily induced by the existence and threatened use of a coerced confession.

This Court has clearly and consistently held that an involuntary or coerced plea of guilty is inconsistent with due process of law and thus invalid. In so holding, this Court has focused upon the particularized allegations at issue and has not attempted to catalogue the other ways in which a plea can be unconstitutionally coerced. *Boykin* v. *Alabama,* 395 U.S. 238 (1969) (failure of record to show that plea was intelligent and voluntary); *Machibroda* v. *United States,* 368 U.S. 487 (1962) (promises of leniency and threats of reprisal by prosecutor); *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U.S. 116 (1956) (threats by prosecutor to physical safety of defendant and his family and failure to advise as to nature and consequences of plea); *Von Moltke* v. *Gillies,* 332 U.S. 708 (1948) (deprivation of right to counsel);[3] *Waley* v. *Johnston,* 316 U.S. 101 (1942) (threats by prosecutor to publish false statements). Indeed, in *Pennsylvania ex rel. Herman* v. *Claudy, supra,* Mr. Justice Black reviewed this Court's decisions as establishing that "... a conviction following trial *or on a plea of guilty* based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause...." 350 U.S. at 118 (emphasis added).

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[3] *House* v. *Mayo,* 324 U.S. 42 (1945); *Tomkins* v. *Missouri,* 323 U.S. 485 (1945); *Williams* v. *Kaiser,* 323 U.S. 471 (1945); *Smith* v *O'Grady,* 312 U.S. 329 (1941); *Walter* v. *Johnston,* 312 U.S. 275 (1941).

It seems clear, therefore, that a valid constitutional claim is presented when a habeas corpus petition alleges that a guilty plea was involuntarily rendered because of the existence and threatened use of a coerced confession. At least five courts of appeal in addition to the Second Circuit have so held.[4] Moreover, such a claim is analogous to the cases where this Court has already held that a confession may be coerced by the existence of a prior coerced confession. *See Leyra* v. *Denno,* 347 U.S. 556, 561 (1954); *Reck* v. *Pate,* 367 U.S. 433, 444 (1961); *cf. Harrison* v. *United States,* 392 U.S. 219 (1968).

Indeed, even the State now appears to concede for the first time that "a habeas corpus petitioner who can show a continuation of coercive elements from the time of confession to the time of plea, has always been entitled to relief." *Brief for Petitioner* 28.

In light of the principles enunciated by this Court, the Rule in six Circuits, and even the suggestion in the petitioner's brief, the question thus becomes one of the proper procedure for the district court which receives such a habeas petition.

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[4] See *Kott* v. *Green,* 387 F.2d 136 (6th Cir. 1967); *United States ex rel. Collins* v. *Maroney,* 382 F.2d 547 (3d Cir. 1967) (*per curiam*); *Smith* v. *Wainwright,* 373 F.2d 506 (5th Cir. 1967); *Sessions* v. *Williams,* 372 F.2d 366 (9th Cir. 1966); *Shelton* v. *United States,* 292 F.2d 346 (7th Cir. 1961), *cert. denied,* 369 U.S. 877 (1962).

In certain other decisions in some of these circuits the courts have applied this general rule but denied relief to the prisoner because after full hearings in the State Courts or District Courts, the confessions or the plea were found to be voluntary. See, *e.g., Busby* v. *Holman,* 356 F.2d 75 (5th Cir. 1966); *Humphries* v. *Green,* 397 F.2d 67 (6th Cir. 1968); *United States ex rel. McCloud* v. *Rundle,* 402 F.2d 853 (3d Cir. 1968).

One answer, but an improper one, to this question is that of the district courts in the Second Circuit prior to that Circuit's decision in the instant cases. Those courts tended to search such a petition to determine if the prisoner was represented by counsel at the time of the plea. If he was, the petition was dismissed as in the case of Wilbert Ross, without requiring the State to respond, on the ground that a plea of guilty was a waiver of all prior nonjurisdictional defects. The district courts thereby ignored the fact that the prisoner was coerced into making confessions, was denied the right to consult with his attorney, and was not advised of his right to remain silent, and refused to consider the impact which such a coerced confession might have had on the voluntariness of the plea. That result, it is submitted, is contrary to good sense and to precedent. Such a result is particularly egregious when the only state procedure which was available to the prisoner at the time of his plea for testing the voluntariness of his confession—submission of the issue to the trial jury—was an unconstitutional one, *Jackson* v. *Denno,* 378 U.S. 368 (1964).[5]

The proper answer, as given by the Second Circuit in these cases, is to hold an evidentiary hearing to determine if the plea is voluntary or involuntary. Indeed, *Townsend* v. *Sain,* 372 U.S. 293 (1963), and the subsequently amended statutory scheme, 28 U.S.C. §2254(d)(1) (Supp. II, 1967), require such a hearing. In short, the applicant for federal

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[5] It is clear that *Jackson* v. *Denno* is to be applied retroactively. First, *Jackson* v. *Denno* itself was a federal habeas corpus case. Second, the cases dealing with whether other recent decisions of this Court should be applied retroactively have expressly recognized that *Jackson* v. *Denno* is to be so applied. *Johnson* v. *New Jersey,* 384 U.S. 719, 727-29 (1966); *Tehan* v. *Shott,* 382 U.S. 406, 416 (1966); *Linkletter* v. *Walker,* 381 U.S. 618, 639 n. 20 (1965).

habeas corpus is entitled to his day in court on the issue of the voluntariness of his guilty plea.[6]

The need for an evidentiary hearing in this case is underscored by the nature of the test to be used to determine the voluntariness of the plea and of the confessions. The test of the voluntariness of a guilty plea was well put by Judge Weinfeld in *United States* v. *Colson,* 230 F.Supp. 953, 955 (S.D.N.Y. 1964) (footnotes omitted):

> "The determination of the ultimate question of whether the defendant, at the time he pled guilty, had the free will essential to a reasoned choice, rests upon probabilities and, of course, cannot be resolved with mathematical certainty. It involves an evaluation of psychological and other factors that may reasonably be calculated to influence the human mind. The issue of the defendant's state of mind 'is to be decided by the trier of the fact, whether court or jury, just as any other fact issue—the reasonable inferences to be drawn from all the surrounding facts and circumstances'. Accordingly, it is necessary to consider the plea of guilty against the totality of events and circumstances which preceded its entry."

Similar criteria are used to test the voluntariness of confessions obtained and used prior to the effective dates of *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), and *Miranda* v. *Arizona,* 384 U.S. 436 (1966).[7] The test requires the court to make a determination as to the ultimate issue of volun-

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[6] *Cf. Mempa* v. *Rhay,* 389 U.S. 128, 136 (1967) ("[T]he incidence of improperly obtained guilty pleas is not so slight as to be capable of being characterized as de minimis").

[7] See *Johnson* v. *New Jersey,* 384 U.S. 719 (1966).

tariness upon the "totality of the circumstances," *Haynes* v. *Washington,* 373 U.S. 503, 514 (1963), and upon "the entire record," *Davis* v. *North Carolina,* 384 U.S. 737, 741 (1966). *See generally* Comment, *The Coerced Confession Cases in Search of a Rationale,* 31 *U. Chi. L. Rev.* 313 (1964). Thus, the very nature of the test of voluntariness requires an evidentiary hearing where, as here, the petition lays a detailed and specific factual basis for the contention that a guilty plea and confessions were coerced.

Finally, the inquiry into voluntariness may involve difficult factual and legal issues, but that cannot justify the refusal to make it:

> Admittedly there is a fine line between refusing on the one hand to set aside a plea of guilty where there was a possible coerced confession which did not effect the voluntariness of the plea and, on the other, possibly setting aside the plea if the confession caused the plea and thus rendered it involuntary. The line must be drawn, however, on the facts and after a hearing. And there must be a hearing when the allegations of the petition make out a possible fatal infection of the plea from the confession. *Carpenter* v. *Wainwright,* 372 F.2d 940, 942 (5th Cir. 1967).

In sum, we submit that the rule adopted by the court below is a sound one, bottomed, as it is, on the relevant decisions of this Court safeguarding against coerced confessions and involuntary pleas of guilt, and requiring evidentiary hearings where a prisoner alleges facts which if proven would entitle him to relief. It is the prevalent rule among the Circuits, and its administration does not seem to have hampered the judicial machinery in those

Circuits, which is understandable since in order to be granted a hearing, the petitioner must allege specific facts which demonstrate that the confession was coerced and the plea involuntary. Finally, and most importantly, a rule which, in determining whether a plea of guilty was involuntarily entered, takes into account the fact that law enforcement officials may have forced a confession from an accused is one which holds out the possibility of federal relief in situations of official illegality. It is not an invitation to a jail delivery.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit in the instant cases should be affirmed.

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January, 1970

SUPREME COURT, U. S.

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 153

DANIEL McMANN, Warden of Clinton Prison, Dannemora, New York and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

against

WILLIE RICHARDSON, FOSTER DASH and McKINLEY WILLIAMS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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REPLY BRIEF

ARGUMENT

The standards suggested by respondents for measuring the adequacy of a petition for habeas corpus by a state prisoner who has pleaded guilty are consonant neither with the decisions of this Court nor with the demands of justice or common sense.

1. None of the guilty pleas in these cases is "based on" a coerced confession.

Respondents have abandoned the Second Circuit and have struck out on their own. In doing so, however, they have not suggested to this Court any more viable stand-

ards by which to measure the allegations in their petitions than did the majority below. Respondents pay lip service to the Second Circuit decision by contending first that if a guilty plea is "based on" (Br., pp. 18, 25) or "predicated upon" (Br., p. 22) a coerced confession or is "brought about" (Br., p. 23) by the confession or if the confession is "the motivation for" (Br., p. 20) or "used to secure" (Br., p. 16) the plea, the conviction is void. This presumably is the substantial motivation test announced by the Second Circuit.

These conclusory standards find no support in the facts of these cases. In none of these cases is there even an allegation that any of the prosecutors or courts involved in these convictions had any idea that a confession was coerced or false. Respondents never confronted the State with a claim of coerced confession contemporaneously with conviction. There is no allegation that any state officer either directly or indirectly threatened any of these respondents with the introduction of a confession, let alone with the introduction of a coerced confession, if they refused to plead guilty. In short, the State in no way used the alleged confessions as leverage to induce these guilty pleas to reduced charges.

In the absence of any such allegations, respondents' claim comes down to the fact that the existence of confessions which they claimed to be coerced automatically entitles them to their release. Yet, if these respondents had gone to trial and moved to suppress the confessions and those confessions had been suppressed, the Court of Appeals would not have been misled into vitiating the convictions since the confessions were not introduced in evidence. Similarly here, if coerced confessions existed, they were not introduced against the respondents and any claim regarding such confessions is irrelevant to an attack upon their convictions. This Court has refused to hold that a prior illegal act of a state completely bars prosecution. *United States* v. *Blue*, 384 U. S. 251 (1966).

The cases relied on by respondents do not support their invocation of the "based on" or "threatened use" standard in the absence of specific factual allegations. We have in our main brief (pp. 26, 28-29) discussed *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116 (1956) and *Waley* v. *Johnston*, 316 U. S. 101 (1942). *Waley*, of course, did not involve a confession claim and in *Herman* the facts clearly established that coercion ran from the confession to the plea.

Nor is *Chambers* v. *Florida*, 309 U. S. 227 (1940), of any assistance to respondents. In that case even the defendants who pleaded guilty had their confessions used against them. Florida has a separate sentencing proceeding even for defendants who plead guilty and the confessions were affirmatively used by the State at that proceeding (*Chambers* v. *State*, 152 So. 437 [1934]). The State consistently conceded that the confessions were used to obtain all the convictions. Moreover, the evidence in that case with respect to pervasive and continuing official involvement in the coercion of the confessions made that case very similar to *United States ex rel. Perpiglia* v. *Rundle*, 221 F. Supp. 1003 (E. D. Pa. 1963) (Petitioners' main brief, pp. 28-30).

By footnote and appendix respondents have placed before this Court a number of other cases which they claim uphold the vague standard for which they argue. Thus, in footnote 29 on page 32 of their brief, respondents cite *Zachery* v. *Hale*, 286 F. Supp. 237 (D. C. Ala. 1968); *United States ex rel. Cuevas* v. *Rundle*, 258 F. Supp. 647 (E. D. Pa. 1966) and *Smiley* v. *Wilson*, 378 F. 2d 144 (9th Cir. 1967).

Zachery, is a perfect example of a *Herman* v. *Claudy*, type of case. Zachery was a 16-year-old illiterate youth charged with murder in the first degree, who 11 days later entered a guilty plea having been denied a change of venue, a continuance and a sanity hearing. The state

stipulated that he had been held incommunicado during this time and his attorney properly despaired of saving the boy's life in the face of such disabilities. Obviously, the factors which illegally induced the confession in that case had not been removed at the time of plea and to a great extent were the same as those that motivated the plea. Obviously too, the trial court's complete refusal to grant relief to which the defendant was clearly entitled effectively precluded him from going to trial. *United States ex rel. Perpiglia* v. *Rundle, supra.*

By contrast *Smiley* v. *Wilson, supra* is not substantially different from the opinion below and is equally incorrect. (See Dissent of Judge Byrne, *id.*, at 149-152.) There the petition for habeas corpus attacked three judgments of conviction for which petitioner was serving sentences in state prison. He had gone to trial in two of the instances. In an undifferentiated application for relief, he alleged in all three cases that all the confessions were involuntary. The warden replied that petitioner had not raised the issue of involuntariness in the two cases in which he had gone to trial and that the involuntariness of his plea in the third case precluded his raising the issue in that case. The Court disagreed (*id.* at 147):

> "It may be that this is an accurate statement with regard to the other two applications, each involving a trial after a plea of not guilty. However, it is not responsive to the coerced plea issue in Case No. 156591, now under discussion, because in that case Smiley pled guilty and there was no trial at which a confession could have been introduced in evidence."

This holding that there must be a hearing on the voluntariness of the confession not introduced against *Smiley,* while those used against him were immune from attack, is not supported by any discernible rationale. Thus, the only distinction between that case and this is that the Ninth Circuit treated the case as one based on the specific

facts of this case whereas the Second Circuit issued a ruling *in banc* which was intended to cover all future claims of invalid guilty pleas. And respondents' claim that other circuits "have lived with the 'floodgates [sic]'" (Resp. Br., p. 49) that were opened by the Second Circuit is not accurate. No other circuit has elevated a holding in a specific case to a general rule. The general language which is found in some of respondents' citations which supports their theory frequently belies the facts in those cases where the plea itself is directly challenged. See, e.g., *Parker* v. *State,* 2 N. C. App. 27, 162 S. E. 2d 526 (1968), *cert. granted* 395 U. S. 974 (1969), O. T. 1969, No. 268; *Williams* v. *Wainwright,* 415 F. 2d 1136 (5th Cir. 1969); *Bright* v. *Rhay,* 391 F. 2d 915 (9th Cir. 1968); *Zachery* v. *Hale, supra; United States ex rel. Perpiglia* v. *Rundle, supra.* Compare *e.g., Smiley* v. *Wilson, supra.* By contrast the cases cited by petitioners which reject respondents' theory in those (Main br., p. 25) and other circuits (Main br., pp. 26-27, 32) are pointedly ignored. Suffice it to say that the cases cited where relief is granted because of continuing coercion would have been decided that way before the Second Circuit decision, and that the reasoning in those cases which granted ultimate relief without allegations of continuing coercion, is strained and untenable.

The majority opinion does not deny the magnitude of its impact and the concurrence by Judge Kaufman was directed at limiting that impact. It is Judge Kaufman's interpretation of the rule announced by the majority that it only applies to pleas of guilty made before this Court's decision in *Jackson* v. *Denno,* 378 U. S. 368 (1964). Of course, this interpretation is rejected by respondents (Resp. br., p. 45). The three independent dissents demonstrate conclusively that the impact of the majority rule will be enormous and common sense supports their presentations.

United States ex rel. Cuevas v. *Rundle, supra,* concerning a youth who pleaded guilty to murder generally and then was subject to Pennsylvania's unusual procedure of a separate trial proceeding to determine the degree of guilt, also involves a situation in which, as in *Chambers,* a confession was used by the State. The writ was issued in *Cuevas* because, under the facts of that case, the defendant had not been informed, apparently by the court, of his right to test the voluntariness of his confession. Respondents appear to say elsewhere that this warning is constitutionally required even where the confession is not introduced (Br., p. 29, footnote 27).

Nonetheless, respondents artfully avoid suggesting that the judicial procedure for accepting pleas must be altered so that this warning is given. In so doing, respondents avoid having to face the omission of this warning from Federal Rule of Criminal Procedure 11 and this Court's analysis in *Boykin* v. *Alabama,* 395 U. S. 238 (1969) and *McCarthy* v. *United States,* 394 U. S. 459 (1969). (See petitioners' main br., pp. 50-52.) Astoundingly, claiming that their pleas were illegally obtained by the State, the proceeding at which they were obtained is not discussed at all. Rather, respondents claim at one point that the colloquies at plea and sentence are not reliable" (Resp. Br., p. 26) and, at another, complain that the district judge in *Williams* did not have those records before him (Resp. Br., p. 12).* It would appear (A. 38, 72), that all three district judges did examine those records before dismissing the writs although these minutes were not before the court below. It is not petitioners' position that this examination constituted a hearing. In the face of a

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* Respondents also note that there was no opposition filed in the District Court in *Richardson.* It is the practice in the Northern District for the Court to preliminarily examine petitions for habeas corpus and to dismiss those which can be disposed of on their faces without requiring opposition.

claim of a coerced guilty plea those are the essential records. It is respondents who minimize, when they do not ignore, the conviction procedures.

2. Respondents have failed to establish any connection between their allegedly coerced confessions and their allegedly involuntary guilty pleas.

Respondents apparently realize the weakness of the "based on" concept standing alone, since abandoning the Second Circuit they have abruptly switched to a so-called "nexus" theory (Resp. Br., p. 24 and Point II). This is an attempt to accommodate their position with the decisions of this Court that there must be a connection between the alleged coercion of a confession and the alleged coercion of the guilty plea and that that connection must be a factual one of continuing coercive elements. Respondents agree that there must be a connection, or what they denominate as a nexus, but what they see in each of these cases as a nexus is in fact a wholly independent factor totally unrelated to the alleged illegality which supposedly coerced the confessions.

These factors, are in the *Richardson* case, the alleged incompetence of counsel and in the *Dash* and *Williams* cases, the existence at the time of the pleas of guilty of the pre-*Jackson* v. *Denno,* 278 U. S. 368 (1964), procedure in New York for testing the voluntariness of confessions. The nexus in each of these cases is apparently a substitute for substantial motivation which respondents would not like to have to establish but which can not fairly be read out of the decision below. With both of these nexus claims different as they are, there are common faults. First, as we have stated, neither bears any relation to why the confession is involutary, if it is. Thus, any inquiry into the voluntariness of the confession would be irrelevant. Second, each requires the establishment of an inference upon an inference upon an inference. Thus, an

alleged confession allegedly coerced could not be tested by an allegedly incompetent counsel or an allegedly unreliable procedure. Contrast *Fay* v. *Noia*, 372 U. S. 391 (1963), so heavily relied on by respondents, in which, however a concededly coerced confession was in fact used against Noia who contemporaneously objected to its use, demonstrating the coercion at trial.

The gravamen of respondents' argument is that a nexus is created in the absence of allegations by means of a presumption of incompetence of counsel (Resp. br., pp. 24-25, 45). Thus in the absence of an affirmative statement in a petition for habeas corpus relief that counsel was competent (Resp. br., p. 45), petitioner may attack an allegedly coerced confession notwithstanding the fact that it was not used against him. Respondents contend that only when a petitioner states that his counsel was competent is the "clear danger" (Resp. br., p. 15) of a pre-*Jackson* trial relevant. Thus the nexus is no factor at all and every plea of guilty is subject to evidentiary attack. Either counsel was incompetent and ignored the hazard of a pre-*Jackson* trial or if, by chance, competent, wisely advised that trial was not a viable alternative. In either event a hearing must be held.

As if the mere stating of the theory were not enough, respondents' factual support for their nexus argument further demonstrates how unfounded the argument is. Thus, in *Richardson* the claimed nexus is the alleged incompetence of counsel. Counsel is said to have been inadequate because he saw Richardson only briefly, and because he misadvised him by telling him that he could raise the voluntariness of his confession at a time subsequent to the plea. Counsel to Richardson in the trial court was an experienced practitioner in criminal law. He is a reputable member of the New York Bar. His affidavit before the Court below indicated that he had consulted with respondent and his co-counsel, that they had investi-

gated the case and that they had secured a plea to a lesser charge (A. 105-107). Richardson on the other hand has shown himself in his other affidavits to be untrustworthy (Petrs. Main br., 9-10, 38-39), and his affidavits on their face are patently incredible. When Richardson pleaded guilty, a careful exploration of the truth and the voluntariness of the plea was undertaken by the trial court. Yet, the majority below relied on allegations submitted for the first time five years after the events to, in effect, establish a presumption against the competency of counsel and the validity of the conviction. Thus, a situation has been created where any application, no matter how fanciful, is sufficient to haul counsel before a collateral inquiry and have him establish his competence in each case he undertook.

In this Court, respondents suggest for the first time that counsel was so incompetent that the "option of going to trial . . . is not a legitimate one" (Respondents' br., p. 28). Even Richardson's allegations of incompetence relate to legal advice rather than to ability to conduct a trial. The suggestion that counsel is the only neutral agent between the confession and the plea ignores both the crucial role of the judge who accepted the plea and the fact that time itself is a sufficient factor. The claim on behalf of Richardson that any course other than a guilty plea might have offended the judge is shocking since this "specific" allegation is admittedly a quotation from *United States ex rel. Perpiglia* v. *Rundle, supra* and not made by Richardson at all. It in fact refers to a motion to withdraw a plea before a judge who seemingly was not neutral.

The second nexus found by respondents is the existence of the pre-*Jackson* v. *Denno* procedure in New York for testing the voluntariness of confessions. The first and most egregious error made with respect to this claim on behalf of *Dash* and *Williams* is found in the Questions Presented (Respondents' br., pp. 2-3) with respect to both

respondents. It is suggested that counsel advised each of them that the means of testing a confession was "inherently unreliable". There has never been an allegation that either counsel so advised either respondent. There has never been an allegation that either respondent was even aware of the difficulties posed by the pre-*Jackson* procedure. There has never been an allegation that either respondent pleaded guilty because of the pre-*Jackson* procedure. Each respondent merely alleged that after *Jackson* v. *Denno* it was clear that if he had gone to trial, the trial would not have been a fair one (A. 29, 54-55). In short, each uses hindsight to create a dilemma for himself which he does not allege existed at the time.

The claim that counsel was unable to "do anything meaningful to prevent the confession from being used" (Respondents' br., p. 34) is erroneous. Although we have stated in our main brief that a hearing on voluntariness must necessarily have been in the presence of a jury (Br., p. 43), that statement was, as respondents have accused us in a different context, "overgenerous" (Respondents' br., p. 29, footnote 27). For example, a special verdict could have been requested (New York Code of Criminal Procedure, §§ 436 and 438). Moreover, the trial judges in New York State obviously did not regard the rule as mandatory. A [redacted] trial transcript [redacted] has come to our attention for reasons unrelated to this case [redacted] which demonstrates that it was the practice in many cases to hold a *voir dire* on a confession would be held out of the presence of the jury.* Respondents' argument on the meaning of *Jackson* v. *Denno* is otherwise answered in our main brief, Point II.

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* *People* v. *Jose Crespo, et al.*, New York County, sentenced (after a guilty plea following two weeks of trial) on May 26, 1960. In *Crespo*, the following took place:

"The Court: My only concern at this point is whether or not the statement obtained from either defendant was obtained as a result of force or fear induced by threats to such an extent that it must as a matter of law be excluded from the jury. There are two ways as I understand it, that we may proceed at this time:

(*footnote continued on following page*)

The fact that the *Stein* rule may have been inadequate after a case actually went to trial, is not shown by respondents to have been so dangerous that it inevitably coerced their guilty pleas. There is absolutely no evidence that the *Stein* procedure once sanctioned by this Court and overruled in the face of sharp dissent, has ever coerced a single guilty plea.

3. Hearings are unnecessary to adjudicate the incredible claims either of coerced confessions or of the supposedly independent contentions of respondents.

The instant self-serving allegations of coerced confessions, incompetent advice of counsel, threats by a judge, and misunderstanding of the status of robbery in the

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(*footnote continued from previous page*)

> You may apply for an opportunity to examine the detective, and this testimony can be taken in the absence of the jury. If an issue of fact—if it is established as a matter of law that the statement should be exluded [sic], I will rule accordingly.
>
> On the other hand, if the factual issue is raised which requires that you submit the issue of the voluntariness of the statement to the jury, then of course the questions and answers must be repeated in the presence of the jury." (546-547)

Counsel asked for a *voir dire* in the absence of the jury and it was granted for such time as it became relevant, that is when the statements were about to be used (548). At that time, the following occurred:

> "The Court: If it is the intention of the defense to attack the voluntariness of the statement/or confession, I will charge the jury appropriately with respect to that law. If the evidence establishes that it should be excluded as a matter of law, you may then make the appropriate application.
>
> Mr. Levine: I was under the impression that usually this is done in advance before the jury hears it if we object to the voluntariness.
>
> (At this point there was an off-the-record discussion at the bench, out of the jury's hearing, after which the proceedings were resumed in open court, as follows):
>
> Mr. Levine: In the light of the conference at the bench, that objection is withdrawn." (579)

Crespo is presently seeking habeas corpus in reliance on the decision below. *United States ex rel. Crespo* v. *LaVallee* (S.D.N.Y.), 69 Civ. 5195.

realm of crimes are inherently incredible. No reasonable person believes that there is any possibility that any Court will hold that these respondents were coerced into confessing. It is certainly beyond the pale of possibility that their claims, independent of coercion, are sufficient to warrant release from custody. Yet if the decision below stands virtually every person who crossed paths with these petitioners between the time they were arrested and the time they were sentenced will be called to Court to answer these frivolous charges. No conceptual theory demands so much. By way of the flexible writ of habeas corpus, such exercises in futility may be avoided without ignoring the pleas of those unjustly imprisoned.

CONCLUSION

The decisions below should be reversed and the cases remanded with instructions to dismiss the petitions.

Dated: New York, New York, January 15, 1970

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1969

McMANN *v.* ROSS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 153. Decided December 8, 1969

PER CURIAM.

Upon consideration of the suggestion of mootness by reason of the death of the respondent, Ross, the judgment of the Court of Appeals, as to Ross, is vacated and the case is remanded to the United States District Court for the Eastern District of New York with directions to dismiss the petition for writ of habeas corpus as moot.